

## **THINGS OF MONETARY VALUE**

**1991-2021**

**21-19—Things of Monetary Value:** The Town owned an historic artifact, a four-panel wooden enclosure with etched glass (the “Cage”), that used to be part of the Old Town Hall. The Town recently disassembled the Cage for lack of use and to make way for renovations. Four months ago, one of the Town’s committee members asked if they could have the Cage. They were told no because of their status as a Town Official. The Town tried to get the Cage appraised but was unable to assign the Cage a value. After the recent Town election, the same Town Official again asked for the Cage. This iteration of the Town Council was inclined to let the Official have the Cage for free. [One Town employee], suggested that they seek an advisory opinion from the Commission. [The employee] believed that the item should be sold through a sealed bid process in which the Official could participate.

### **Personal Jurisdiction**

No Code of Conduct legislation shall be deemed sufficient to exempt any county, municipality or town from the purview of Subchapter I, Chapter 58 of Title 29 unless the Code of Conduct has been submitted to the State Ethics Commission [now Public Integrity Commission] and determined by a majority vote thereof to be at least as stringent as Subchapter I, Chapter 58, Title 29.”

Municipal employees, as well as elected and appointed officials, are subject to the State Code of Conduct unless the municipality adopts a Code of Conduct that is at least as stringent as the State Code of Conduct. The Town had not adopted their own Code of Conduct and fell within the Commission’s jurisdiction.

### **A. No state employee, state officer or honorary state official shall accept ...any gift...or other thing of monetary value if it may result in:**

The Code of Conduct does not define “gift.” The rules of statutory construction require terms to be read in their context and given their common and ordinary meaning consistent with the manifest intent of the General Assembly. The dictionary definition of “gift” is “something voluntarily transferred by one person to another without compensation.” This definition seems consistent with the General Assembly’s intent because the same provision separately refers to “any compensation” and “payment of expenses.”

Since the Official did not offer any compensation in exchange, the acceptance of the Cage would be considered a gift. The Commission next considered whether the giving of the gift to the Town Official would result in any of the following:

#### **(1) impaired independent judgment in exercising official duties;**

The Official appeared to have already evidenced impaired judgment by approaching not one, but two, Town Councils to ask for the Cage. The denials could cause the Official to harbor resentment towards the members of the Town Council which, in turn, could evidence itself when the Official was performing their official duties.

**(2) showing preferential treatment to any person;**

The Town Council may not show preferential treatment towards a member of [a Town committee]. As a result, the Cage should be disposed of in a way in which the bidders are not identified. That could occur through a sealed bid process or any other manner that conformed with the Town Charter.

**(3) government decisions outside official channels;**

The Official was attempting to acquire the Cage by requesting it directly from the Town Council. It did not appear that they attempted to bypass official channels.

**(4) Any adverse effect on the confidence of the public in the integrity of the government of the State.**

This is basically an appearance of impropriety test. The test is if a reasonable person, knowledgeable of all relevant facts, would still think the employee or official would be unable to act with honesty, integrity, and impartiality.

A governmental body giving government property to one of their own was sure to raise eyebrows. Other citizens would wonder why the Official was given the property. Disposing of the property in an open and anonymous manner would assure the public that the process was fair and impartial.

Motion—The property may not be gifted to the Town Official. It should be disposed of in an anonymous manner that is consistent with the Town's processes and procedures. Moved—Commissioner Smith; seconded—Commissioner Moore. Vote 5-0, approved.

**19-28—Complaint Using State Time and Resources for Personal Advancement**  
*(Commissioner Simpson recusing and left the meeting)*

**I. Procedure**

Any person may file a sworn Complaint alleging violations of Title 29, Delaware Code, ch. 58. 29 *Del. C.* § 5810(a). On June 25, 2019, [Complainant] submitted a sworn Complaint against [a State employee]. PIC received the Complaint (including Exhibit A) via email from [the Deputy Attorney General assigned to the agency] on June 26, 2019 and via State mail on July 1, 2019. The Complaint was notarized in the appropriate format. However, the Commission asked Commission Counsel to contact [the DAG] and inform him/her to re-submit the Complaint, removing any allegations related to 29 *Del. C.* § 5805(a) because the Commission did not believe that any of the alleged conduct applied to that provision in the Code of Conduct. The Complaint was re-submitted on August 2, 2019.

At this stage of the proceedings all facts were assumed to be true. 29 *Del. C.* § 5808(A)(a)(4). Allegations that are deemed to be frivolous or that failed to state a claim should be dismissed. 29 *Del. C.* § 5809(3). However, seeing no frivolous allegations suitable for dismissal, the Commission then examined the allegations to determine if a majority of the

Commission had reasonable grounds to believe a violation may have occurred. *Id.* "Reasonable grounds to believe" is essentially whether there was any reasonably conceivable set of circumstances susceptible of proof of the allegation. *Spence v. Funk*, 396 A.2d 967 (Del. Super., 1978) (interpreting motion to dismiss under Super. Ct. Civ. Rule of Procedure 12(b)).

## **II. Jurisdiction:**

The Commission's jurisdiction is limited to interpreting Title 29, Del. C., ch. 58. See, e.g., 29 Del. C. § 5808(a) and § 5809(2). It may only act if it has jurisdiction over the party charged and jurisdiction over the complaint's substance.

### **A. Personal Jurisdiction**

State employees are defined as "any person...who serves as an appointed member, trustee, director or the like of any state agency...and receives...more than \$5,000 in compensation for such service in a calendar year." 29 Del. C. § 5804(12(a)(2). State agency is defined as "any office, department, board, commission...existing by virtue of an act of the General Assembly or of the Constitution of the State..." 29 Del. C. § 5804(11). As a result, [Employee] fell within the Commission's jurisdiction.

### **B. Subject Matter Jurisdiction**

The Commission may only address alleged violations of "this chapter"-Title 29, ch. 58. 29 Del. C. § 5810(h). The Complaint alleged that [Employee] violated the Code of Conduct's: appearance of impropriety prohibition (29 Del. C. 5806(a)); prohibition against incurring obligations in substantial conflict with his/her state duties (29 Del. C. 5806(b)); and prohibition against using his/her State job for securing unwarranted privileges, private advancement and gain. (29 Del. C. 5806(e)). All of the alleged misconduct fell within the Commission's jurisdiction.

## **III. Facts**

[Employee] previously worked [for a regulating board under the purview of a State agency]. He/she worked in the position for five years]. [Employee]'s responsibilities included: coordinating, planning meetings; providing analysis, advice and support in the development of rules and regulations regarding licensure; compiling statutorily mandated reports and disseminating the information to various government officials; other administrative management tasks.

Beginning in October 2018, [agency] employees began to question [Employee]'s frequent absences from the office. Those inquiries led the Human Resources Department to begin investigating the number and length of those absences. In a five month period between October 2018 and March 2019, [Employee] had 75 full, or partial, absences. That information was subsequently compared to [Employee]'s requests for leave, documentation of work completed; email communications (use and content); computer sign-in logs; ID badge access logs.

[Employee] was confronted with evidence that he/she had taken leave from the office on multiple occasions without submitting a leave slip so that the hours could be deducted from his/her vacation and sick time accrual. In essence, he/she was being paid for working when he/she was not in the office. After being confronted with that information, [Employee] submitted

leave slips for a majority of the hours which were called into question. [Employee] was also confronted with emails he/she sent from his/her work computer, using his/her State email address, to individuals associated with [Employee]'s membership in numerous private organizations that were not related to, and sometimes conflicted with, his/her work duties.

After much discussion it was decided to refer the matter to PIC in the form of a Complaint. Subsequent to the submission of the Complaint, [Employee] resigned from his/her position even though he/she was eligible to retire from State service. The [agency] was concerned that [Employee] would try to obtain another State position, which they felt was inappropriate given [Employee]'s professional behavior.

#### **IV. Applicable Law**

##### **A. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).**

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation. 29 Del. C. § 5802. The Commission treated that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test was whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23* and *97-42*. Those circumstances should be examined within the framework of the Code's purpose which is to achieve a balance between a "justifiable impression" that the Code was being violated by an official, while not "unduly circumscribing" their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3). Conversely, conclusory allegations of a conflict of interest without specific factual grounds are insufficient to state a claim. See, e.g. *Camas v. Delaware Board of Medical Practice*, Del. Super., C.A. No. 95A-05-008, J. Graves (November 21, 1995).

The Complaint (including Exhibit A) went into great detail about the facts supporting each alleged violation of the Code of Conduct. In support of a finding of a violation of this provision, the Complaint alleged that [Employee]:

- Had excessive, unexplained absences from work.
- Used State email to discuss gambling with [employees subject to the agency's regulation].
- Assisted [someone] who was seeking certification required by the [agency].
- Recommended personal friends for nomination to [a coveted workgroup] to the exclusion of up to 9,000 other [eligible employees].
- Communicated that [the agency] was unwilling to pay for training rather than the fact that it was not authorized to pay for training.
- Misrepresented to [a high ranking agency official] that a fundraising effort at [an annual banquet] would benefit all members of [a specific regulated group] when it only benefitted [a few people to the exclusion of others].
- Sent a resume to one [regulated group to the exclusion of others]. He/she used State equipment.
- Used his/her State time and equipment to complete a college paper for a relative.

After thoroughly reviewing the Complaint and Attachment A, a majority of the Commission found reasonable grounds to believe multiple violations of 29 *Del. C.* § 5806(a) may have occurred.

**B. No state employee, state officer or honorary state official shall have any interest in any private enterprise nor shall such state employee, state officer or honorary state official incur any obligation of any nature which is in substantial conflict with the proper performance of such duties in the public interest. No state employee, state officer or honorary state official shall accept other employment, any compensation, gift, payment of expenses or any other thing of monetary value under circumstances in which such acceptance may result in any of the following: (1) Impairment of independence of judgment in the exercise of official duties; (2) An undertaking to give preferential treatment to any person; (3) The making of a governmental decision outside official channels; or (4) Any adverse effect on the confidence of the public in the integrity of the government of the State. 29 *Del. C.* § 5806(b).**

In support of a finding of a violation of this provision, the Complaint alleged that [Employee]:

- Performed work on behalf of several private organizations with connections to the [Employee's career field].
- Advocated for, encouraged and raised funds for two [regulated entities] so they could participate in an event related to his/her personal interests to the exclusion of other [eligible entities].
- Used State time and resources to work on his/her private endeavors.
- Used his/her State resources to solicit consulting fees.
- Used his/her State time and resources to recruit [multiple regulated entities for a trip sponsored by his/her private interest, to the exclusion of other qualified entities].

After review of the relevant facts and circumstances; the Complaint; and the statute, a majority of the Commission found reasonable grounds to believe multiple violations of this section of the Code of Conduct may have occurred. "Reason to believe" means "probable cause." *Coleman v. State*, 562 A.2d 1171, 1177 (Del., 1989). "Probable cause" means facts and circumstances are enough to warrant a person of reasonable caution to believe an offense occurred. *State v. Cochran*, 372 A.2d 193, 195 (Del., 1977).

**C. No state employee, state officer or honorary state official shall use such public office to secure unwarranted privileges, private advancement or gain. 29 *Del. C.* § 5806(e).**

In support of a violation of this provision, the Complaint alleged that [Employee]:

- Used his/her State email and State title to secure preferential treatment from his/her daughter's landlord.
- Used his/her State email to seek employment with a private organization.
- Used his/her State email and title to seek a discount on a hotel room.

After review of the Complaint, Attachment A and the statute, a majority of the Commission found reasonable grounds to believe multiple violations of this section of the Code of Conduct may have occurred.

**D. No state employee, state officer or honorary state official shall engage in any activity beyond the scope of such public position which might reasonably be expected to require or induce such state employee, state officer or honorary state official to disclose confidential information acquired by such official by reason of such public position. 29 Del. C. § 5806(f).**

In support of a violation of this provision, the Complaint alleged that [Employee]:

- Revealed to [three non-State employees that one regulated person] had done something “stupid”.

Following a review of the Complaint, Attachment A and the statute, a majority of the Commission found reasonable grounds to believe that a violation of this section of the Code of Conduct may have occurred.

## **V. Decision**

Based on the above facts and law, a majority of the Commission found that there was reason to believe that violations of 29 Del. C. §§ 5806(a); 5806(b); 5806(e); and 5806(f) may have occurred. The matter was to be scheduled for a formal hearing.

**19-16—Acceptance of Gifts:** PIC received an anonymous email alleging multiple instances of wrongdoing by [a State Employee and/or the agency where he was employed]. After reviewing the email, the only allegation that fell within the Commission’s purview was regarding the acceptance of gifts and meals from an agency vendor. Commission Counsel contacted [Employee] to see if he was interested in obtaining an advisory opinion. Shortly thereafter, [Employee] submitted a request for an advisory opinion.

[Employee is a supervisor in a State agency] and has worked there since 2017. In the 1990’s, the Agency began a contractual relationship with [Vendor]. For the past 20+ years, [Vendor] has contracted with the Agency to monitor and examine entities licensed by the Agency to confirm regulatory compliance. At the time [Employee began working for the Agency, the Vendor’s] contract had last been renewed in 2005. In late 2018, at [Employee]’s direction, the Agency posted a Request for Proposal for services provided to the Agency by [Vendor]. When the bid closed, there was only one qualified applicant, [Vendor]. Because of their long-standing relationship and their proximity to one another, the employees of the Agency and [Vendor] have a friendly and familiar relationship. As a consequence, there has been a tendency to blur the lines between the Agency and [Vendor]. After reviewing the allegations, [Employee] pointed to three separate practices which may have led to the anonymous email.

First, several employees of the Agency and [Vendor] attend a professional conference together a few times a year, each of which lasts three to four days. During each trip, [Vendor] would buy one dinner for the Agency's employees. If the meal had not been paid for by [Vendor], the employee would have been reimbursed the expense by the State as part of their travel expenses. During this time, [Vendor]'s contract was not up for review. Once [Employee] decided he was going to regularly RFP the services provided by [Vendor], he told his employees and [Vendor] that they could no longer allow [Vendor] to pay for their meal(s). Second, during the holidays, [Vendor] gave the Agency's executive employees gift baskets estimated to be worth between \$50 and \$100. Some, or all, of the remaining employees usually received a tin of nuts valued at approximately \$30. When [Employee] became aware of the holiday gifts, he asked [Vendor] to discontinue the practice. Lastly, Agency employees regularly drink coffee that [Vendor] has available in their work space. The expected cost of the coffee is 50 cents per cup.

Addressing the allegations in the anonymous email, [Employee] asked the Commission three questions. First, if it violated the Code of Conduct for Agency employees to accept meals paid for by [Vendor]? Second, if the Agency violated the Code of Conduct by accepting holiday gifts from [Vendor]? Finally, if it was a violation of the Code of Conduct for employees to drink coffee provided by [Vendor]?

**29 Del. C. § 5806(b): No state employee, state officer or honorary state official shall accept ...any gift...or other thing of monetary value if it may result in:**

**(1) impaired independent judgment in exercising official duties;**

At the time the meals were paid for and the holiday gifts were accepted, [Vendor]'s contract was not under review. However, the recipients were all employees of a State agency that had the capacity to award, or revoke, vendor contracts. While each individual employee may not have had decision-making authority as it related to vendor contracts, the Commission found that it was reasonable to assume that they would have been able to offer input to those employees who did make those decisions. In order for there to be a violation of the Code of Conduct, the gifts and meals did not have to actually result in impaired judgment, only that they *may* have resulted in impaired judgment.

In this case, [Employee] only found out about the holiday gifts when he received a gift basket at his home while he was out of the office dealing with a personal matter. Once he discovered the gift and the sender, he informed [Vendor] that none of the [Agency's] employees, were permitted to accept the gifts and to please stop sending them. Since then, no further gifts have been sent or accepted. At the meeting, [Employee] stated that he believed that he had memorialized his position regarding the gifts by sending an email to his staff but he was not entirely sure. The Commission advised that if he had not already done so, he should make sure that all of his employees have a written copy of the policy.

The acceptance of coffee by the [Agency]'s employees from [Vendor] did not violate the Code of Conduct. Such an item is considered *de minimis*. When government employees receive things of *de minimis* value, the likelihood of the perception that they are turning their public position into a private advantage is diminished.

**(2) showing preferential treatment to any person;**

The meals and gifts were particularly troubling because of [Vendor]’s status as one of the [Agency]’s contractors for over 20 years. Those observers who did not work in the office could believe that the vendor secured their long-term status by providing the meals and the gifts. Since [Employee] had implemented a policy of not accepting gifts, as well as regularly posting the services provided by [Vendor] for RFP, the concerns regarding preferential treatment were obviated.

### **(3) government decisions outside official channels;**

There were no facts which indicated that the [Agency]’s employees had made government decisions outside official channels. State employees are entitled to a strong legal presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del. January 29, 1996).

### **(4) an adverse effect on the confidence of the public in the integrity of the government of the State.**

This is basically an appearance of impropriety test. *Commission Op. 92-11*. The test is if a reasonable person, knowledgeable of all relevant facts, would still think the employee or official would be unable to act with honesty, integrity, and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997).

During the period of time that the meals and gifts were being accepted by the [Agency]’s employees, the public would likely have found such actions improper, thus creating an appearance of impropriety. Now those practices had ceased, so too did the appearance of impropriety.

## **18-25—Complaint—Using Official Position for Personal Benefit (\$)**

### **I. Procedure**

A properly sworn Complaint must be notarized pursuant to 29 *Del. C.* § 4328(3). [Complainant]’s submission was not notarized. *Hanson v. PIC*, 2012 WL3860732 (Del Super., Aug. 30, 2012) (*aff’d PIC v. Hanson*, 69 A.3d 370 (Del. 2013)). While the Commission could have dismissed the Complaint for failure to be properly notarized, it was likely [Complainant] would simply have the Complaint notarized in the proper format and re-submit it at a later date. As a consequence, the Commission decided to examine the Complaint further to determine if the Commission had jurisdiction over the subject of the Complaint. [Subject is a volunteer for an organization located in a particular City].

### **II. Jurisdiction**

The Commission’s jurisdiction is limited to interpreting Title 29, *Del. C.*, ch. 58. See, e.g., 29 *Del. C.* § 5808(a) and § 5809(2). It may only act if it has jurisdiction over the party charged and jurisdiction over the complaint’s substance.

The Commission examined the Complaint to determine if the allegations were frivolous or failed to state a violation. 29 *Del. C.* § 5809(3); *Commission Rules*, p.3, III(A). At this stage

of the proceedings all facts were assumed to be true. 29 Del. C. § 5808(A)(a)(4). Allegations that were deemed to be frivolous or that failed to state a claim should be dismissed. 29 Del. C. § 5809(3). The remaining allegations were then examined to determine if a majority of the Commission had reasonable grounds to believe a violation may have occurred. *Id.* "Reasonable grounds to believe" is essentially whether there is any reasonably conceivable set of circumstances susceptible of proof of the allegation. *Spence v. Funk*, 396 A.2d 967 (Del. Super., 1978) (interpreting motion to dismiss under Super. Ct. Civ. Rule of Procedure 12(b)).

### **Personal Jurisdiction**

No Code of Conduct legislation shall be deemed sufficient to exempt any county, municipality or town from the purview of Subchapter I, Chapter 58 of Title 29 unless the Code of Conduct has been submitted to the State Ethics Commission [now Public Integrity Commission] and determined by a majority vote thereof to be at least as stringent as Subchapter I, Chapter 58, Title 29."

29 Del. C. § 5802(4).

City employees, as well as elected and appointed officials, are subject to the State Code of Conduct unless the City has adopted a Code of Conduct that is at least as stringent as the State Code of Conduct. 29 Del. C. § 5802(4). [The City] had not adopted its own Code of Conduct. Consequently, its employees and elected officials were subject to the State Code of Conduct.

[Complainant] alleged that [Subject] was using his [volunteer] position for financial gain. Specifically, [Complainant] stated that when the [organization] was [active in the community, Subject would use the organization's credentials for his personal financial benefit]. If [Subject] were an employee or appointed official of [the City], he would be violating 29 Del. C. § 5806(3). ("No [city] employee, [city] officer or honorary [city] official shall use such public office to secure unwarranted privileges, private advancement or gain."). However, [Subject] did not appear to be either an employee or an appointed official of the City while serving [as a volunteer].

The City's charter contained only one provision referencing the City's power to establish and/or organize an [organization that would provide the same services as the volunteer organization]. It read in its entirety: [*omitted to protect the identity of 'Subject'*]

While the City had power [to create a similar organization], it also had the option to donate monies to an [organization that would provide the same services]. It appeared that in lieu of creating [their own organization], the City had opted to donate monies to the [volunteer organization]. The City's website did not include [the organization] in its list of government departments but did include other departments. Furthermore, the [organization received some of its funding by way of contributions, rather than through the City's budget process].

The [City]'s separation from the [organization] was markedly different than the connection between [other cities with similar organizations that were funded through the annual budgeting process].

Given the facts that the [organization] was not a "department" within the [City] and it did not receive monies from the [City] through the annual budgeting process, the Commission decided that [Subject] was not an employee or official of the [City] when acting [on behalf of the organization]. As a consequence, the Commission did not have personal jurisdiction over

[Subject] and he did not fall under the State Code of Conduct. As a result, the Complaint was dismissed.

**13-24 – Honorarium:** Applicant did not attend the meeting. However, the Commission reviewed her submitted writings and was able to render an opinion. The Commission may provide advice based on a written statement. 29 *Del. C.* § 5807(a). Applicant previously obtained an advisory opinion from the Commission regarding the acceptance of an honorarium. (See *Commission. Op. 12-15*). In the previous opinion, the Commission decided that applicant could accept a \$1000 honorarium for participating in a 2 day panel focused on a topic in which applicant had expertise. The event was sponsored by a federal agency. During that hearing, applicant was questioned at length about her participation in the panel and the applicability of 29 *Del. C.* § 5806(b)(1)-(4) given the fact that she would be accepting money from an outside source. The Commission advised that acceptance of the honorarium would not result in: impaired judgment in performing official duties; preferential treatment to any person; official decisions outside official channels; any adverse effect on the public's confidence in the integrity of State employees.

In the request for an advisory opinion, the applicant asked to accept a \$2100 honorarium for a 5 day panel related to similar area of expertise sponsored by the same federal agency. The increase in the amount of the honorarium was reflective of the increased length of the panel. (i.e. 5 days as compared to 2 days). The Commission is required to strive for consistency in its opinions. 29 *Del. C.* § 5809(5). The Commission decided that because the facts and circumstances were similar to the prior request, it would not be a violation for applicant to accept the newly offered honorarium. However, the Commission expressed concern that the honorariums would become a problem if applicant continued to make similar requests. The Commission decided that if applicant asked to accept further honorariums, she should return to the Commission for another hearing.

**12-15 – Honoraria:** A federal agency asked a State employee to participate in a panel meeting for that agency. The panel was to review certain advisory information used across the country as a guide to enhancing and improving certain records systems. The federal agency offered to pay a \$1,000 honorarium for participation, not only in a 2-day panel meeting out-of-State, but also for time spent working on issues pertaining to the review before, and after, the panel meeting. State employees may accept things of monetary value if acceptance would not result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) have an adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(b).

In her State job, she had no occasion to render any decisions about the federal office or about the particular records systems that was being reviewed. Thus, she would not review and dispose of matters where she had a personal or private interest. 29 *Del. C.* § 5805(a)(1). Also, as she made no decisions about the federal agency or the reporting system, she could not show favoritism to the federal agency, in response to receiving the honorarium. She, and others from the public and private sectors, were selected because of prior experiences with the records. As far as whether the offer was preferential treatment to her, the federal agency deemed \$1,000 as the appropriate amount for the panel work. "Honoraria" is offered as a form of payment when no remuneration can be collected at law, e.g., salary. *Black's Law Dictionary*, p. 736 (6<sup>th</sup>. ed., 1990 (citing *Cunningham v. Commissioner of Internal Revenue*, C.C.A., 67 F.2d 206). It is

given in consideration of services rendered. *Id.* It differs from a “gift,” because an item is not a “gift” if it requires anything in return. See, e.g., 29 Del. C. § 5813(a)(4)(e) (not a “gift” if consideration must be given in return); *Commission Op. No. 00-13* (“gift” means “no strings attached.”). She was asked to render the service based on many years of experience locally, regionally, and nationally in the same type of records improvement, dating back to 2000, before she assumed her current position. Thus, nothing suggested the honoraria was offered as preferential treatment to her.

In interpreting a similar federal law, Courts noted that when a government employee is paid by an outside source, it may appear to the public that the employee may be beholden to them and prone to provide decisional favors in return. *Commission Op. No. 97-33* (citing *Sanjour v. EPA*, U.S. Court of Appeals (D.C.) 56 F.3d 85, 94 (1995)). In *Sanjour*, the source was a private company. Here, it was not a private company offering the honorarium; it was a federal agency. The *Sanjour* Court noted the difference when a federal agency decides to spend taxpayer funds for work performed on its behalf. It said the use of those funds is under the agency’s “watchful eye.” *Sanjour v. EPA*, D.C. App. Ct., 984 F.2d 434, 445 (1993). The Commission did not have the authority to review the amount of the honorarium decided on by a federal agency. What was important was that she could not show the federal agency favoritism in her decision making, nor would she have the opportunity to make official decisions outside official channels since the agency did not deal with her office. She stated she would not use State time or resources to perform the private work. The Commission advised that she could accept the honorarium.

**12-07 – Payment of Expenses:** A State Supervisor sought an opinion on whether it would be a conflict for 7 other employees to accept payment of expenses from a vendor to visit its manufacturing facility as part of their professional development. As noted above, the Delaware Superior Court has upheld the process of allowing an official who is subject to the Code of Conduct, to seek advice on the conduct of another. *Post v. Public Integrity Commission*. The company would pay for a bus trip from its headquarters in Maryland to its factory in another State, and pay for lunch, dinner and an overnight hotel. They would visit the facility the next day and leave that day. The bus trip to the factory was an estimated 6 ½ hours. Also, the Supervisor was not attending, as he, unlike the other employees, participated in decisions on whether to buy the company’s product. State employees may not accept payment of expenses or anything of monetary value if acceptance may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public’s confidence in its government. 29 Del. C. § 5806(b).

The attendees did not participate in decisions to buy from the company. Their official duties did allow them to select certain options on the product. However, that selection was extremely limited by regulations pertaining to the product and basically only gave them an “either/or” choice, e.g., the option of one particular color or one other particular color. Thus, their input would not insure any special treatment for the company. Also, the facts did not indicate they were receiving any type of extravagant trip since it would be a long bus drive; followed with an overnight stay at an ordinary hotel, and no special, expensive meals. They would have limited time for such things as sightseeing since they would leave the next day after going through the facility. Further, they were not singled out from other State employees in the same job. Rather, the opportunity was offered at a monthly staff meeting to all persons in that field, and those persons indicated an interest. The trip was for the purpose of professional

development. For this particular field of employment, by regulation, they are to seek professional development opportunities. Additionally, most of those who wanted to attend had little experience in the field, and the knowledge could assist them in better performing their functions. Those functions, by regulation, included many safety issues. Also, one attendee was tasked with teaching others how to operate the product, and how to properly use the safety features. The Supervisor said he previously visited a different manufacturing plant of this product at a conference some years ago, and found it helpful. He said such opportunities through the State were not easy to obtain because of the cuts in funding which have resulted in training cutbacks.

The Commission decided they could accept the payment of expenses as they had no direct involvement in the bidding process; very limited involvement in the option process; there was a lack of training available through the State; they would not receive lavish treatment in terms of hotels and meals; and the professional development could benefit not only the attendees, but the State in an area where there could be a lot of litigation.

**11-30 – Vendors Paying For Meals:** Two State employees were working on an agency policy to cover items such as accepting meals from private vendors. They identified three situations where they wanted to know if agency employees could accept meals paid for by private entities:

(1) lunch sessions where a vendor that does business, or is seeking to do business, with the agency would give a presentation on the products or processes they offered. Attendees would usually be field level employees who would be using the product every day or using the process, but not necessarily upper management types. Attendees would potentially provide comments to their supervisor because they had the front-line experience. No one would be required to attend because it would be during their lunch hour. Generally, no credits would be received by the attendees. It was thought that if the vendor provided lunch, employees would be more likely to attend; a benefit to the agency would be that if it is done during the employees' lunch time, it will not take them away from work;

(2) training sessions by qualified instructors, not sales representatives, given to persons required to have the accredited training, and not scheduled just for the lunch hour; and

(3) recognition breakfasts for agency employees who had exemplary performances related to safety. The breakfast would be during State work hours. The request arose because of budget cuts that caused them to discontinue things that, in the past, were paid for out of the agency's budget. They would not solicit vendors to provide the breakfast and the value would be in the range of \$10 per employee, for the quarter in which they won the safety breakfast for the least amount of personal injuries or damage to equipment. They said it would make it somewhat of a competition to get the agency employees thinking about safety, and reward them for their role in providing savings through safety measures. They said generally the organization paying for the meals in all three situations would be companies that contract, or ones that would like to contract with the agency.

The employees said the agency provides training in a variety of ways. Some training was done in-house and meals were not provided; attendees brought their own. They also did training through other organizations. Employees attended courses through the Office of Management and Budget's statewide training program on things like the "soft skills,"— fundamentals of leadership. Their meals were not paid for by the agency or the State. Some training was also given to maintain certification for certain employees, and they could get credits

that might help them in their career ladder, or meet the training requirements for their field. Some employees must obtain professional credits as part of their State job, but that was not the majority. They said if it is required training, and employees are told they must attend, the agency paid for the training, but not necessarily for meals. Other training would be something that could enhance their knowledge in the area where they work because they may find new products that do something more efficiently. Using it may not be their immediate plan, but they would be aware of it.

The Commission decided that it would be a conflict of interest to accept the meals from vendors doing business, or seeking to do business, with the agency over the lunch hour where the training is not accredited; and for the recognition breakfasts; and it might also appear that the State statute on meals for State employees was being circumvented. State law has specific rules on approved recognition programs and when food can be provided. 29 Del. Code § 5950 and § 5112(b)(3). However, meals could be accepted, but not solicited, from organizations not doing business, or seeking to do business, with the agency, if it is accredited training offered by qualified instructors.

**10-38 - Gift:** A State employee's job was to give training to persons in the private sector. During the training she talked about different products on the market that the trainees may be interested in using. She also said that if someone in the class could not afford those products, she did talk about other options. She was a friend of a member of a private group to which she gave training. Later, not immediately after the class, she was working with one of the attendees, showing them how to use a product. She had gotten to know the woman because she had come for training and demonstration of product use several times. They were talking on a personal level and she said if she could afford it she would get a specific product. Later, the private group gave her that particular product. The estimated value was \$130 - \$150. The Commission advised that she should return either the item or the value.

**10-29 – Acceptance of Payment of Expenses:** A private association offered to pay the expenses of a State employee to attend a conference. Its membership consisted of individuals who might do business with his agency, but the organization itself, which was paying, did not do business with the agency. He made no decisions about it, and had no occasion to make decisions about any of its members who might contract with his agency. He cleared it with his agency, who said he should seek the Commission's advice. As he had no decision making authority over the organization or any individual member who contracts with the agency, acceptance would not impair his judgment, and he was not in a position to give them preferential treatment. 29 Del. C. § 5806(b). No facts suggested he could make decisions outside official channels for the organization since it was not affected by any of the agency's decisions. *Id.* This was similar to a prior situation where a private association paid for his expenses several years ago. The Commission did not find a violation or the appearance of a violation at that time. The Commission is to strive for consistency in its opinions. 29 Del. C. § 5809(5).

**10-11 – Lunch from Vendor:** A State agency was asked by one of its vendors if the vendor could provide lunches of sandwiches and chips to State employees attending a workshop that

was being held by the vendor. While the vendor contracted with the agency, most of the attendees would be State employees from other agencies, and they have no decision making authority over the vendor. It offered the lunch so attendees could stay at the facility during lunch and network, and also not be late in returning for the afternoon session. It asked if the lunch would be considered a "gift" to the agency, not a gift to the individual State employees. In prior opinions, PIC noted that the General Assembly provides that only certain agencies may accept gifts or donations, and those laws are not interpreted by PIC. The Code of Conduct restriction on accepting anything of monetary value applied to the individual State employee recipients. It is the individual employee who can accept or reject the lunch. The law prevents them from accepting if acceptance may result in: (1) impaired judgment in performing official duties; (2) official decisions outside official channels; (3) preferential treatment to any person; or any adverse effect on the public's confidence in the integrity of its government. As noted, the principal attendees were from other agencies and had no official duties related to the vendor's contract so they were not in a position to show preferential treatment to the vendor in return for the lunch. A few attendees would be from the contracting agency. While that office did have such decision making authority, no contract or renewal of an existing contract was pending. The Commission decided that based on all the facts, the State employees in this particular situation may accept the sandwiches and chips.

**09-01 – Gift to Supervisor:** Four State employees gave their supervisor a holiday gift, \$25 each, for a total value of \$100. They were the only employees who worked for her. She initially declined the gift, but her employees wanted an advisory opinion to see if she could accept. The Supervisor said her agency got Federal funds and federal rules restrict Supervisors from accepting gifts from employees, except on occasions when gifts are usually given, but even then, gifts are not to exceed \$10.00. The employees said each of them came up with the idea independently. In the past, they had gift exchanges of \$7 to \$10. The Commission found it was likely an inappropriate gift under the federal standards, and they should go by the more specific Federal standard.

**08-52 – Gift:** An agency hosted an annual event to select a winner of a State art contest. The employee did not select the participants for the competition--anyone could compete. She did not judge the event. She did submit a list of potential judges garnered over the years so the Governor could select the judges. After the winner was decided, the employee was responsible for seeing the winning competitor's work through the printing process. The agency got prints to sell, and the artist got prints for personal use. The employee does not decide how many are printed. It is established by the agency. The artist offered a print to the employee to express appreciation for her help through the process. The value of the work at this time is approximately \$135. The Commission ruled that she could not accept the gift. Acceptance could result in an adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(b)(4), which is an appearance of impropriety standard. See, also, *Refine Construction Company, Inc. v. United States*, U.S. Cl. Ct. 12 Cl. Ct. 56, 62 (1987) (interpreting federal restriction prohibiting "any adverse effect on the public's confidence in its government." Court held that an actual or apparent conflict of interest need not be found). Under that standard, the test is whether a reasonable person, knowledgeable of all relevant facts, would still believe the Code were violated. *In re Williams*, 701 A.2d 825 (Del., 1997). This is where the Commission had concerns. First, because he offered the gift to her personally, as opposed to giving it to the agency which sponsored the event. That may make it appear to the public that she was receiving preferential treatment from the artist, which would be prohibited. 29 *Del. C.* §

5806(b)(2). Second, the gift's present value is at least \$135, but could gain value over the years, which may raise public suspicion that she may have used her State position to financially benefit 29 Del. C. § 5806(e), as the gift was for and because of her performance of your State duties.

**NOTE: A public servant is guilty of receiving unlawful gratuities if the public servant solicits, accepts or agrees to accept a personal benefit for engaging in official duties which the public servant is required or authorized to perform, and for which the public servant is not entitled to special or additional compensation. 11 Del. C. § 1206.**

**07-43 – Honoraria & Travel Expenses:** A State employee asked if he could accept honoraria and travel expenses from an institution of higher learning for a one-day presentation. In his State job, he was not responsible for anything related to the presentation. He acquired his knowledge elsewhere before working for the State. He also was not responsible in any way for decisions about the institution. It was common practice for such institutions to offer to pay a fee and travel for their speakers. He contacted the Commission because the job would occur during the day, when he normally would be on State duty. He would take annual leave from his State job. The Commission concluded the employee could accept the honoraria and travel expenses, under these facts, but if they changed, the employee was to contact the Commission.

**07-38 – “Gift”:** A State employee had offered to buy a piece of outdated equipment from a company that did business with her agency. She was not directly involved in matters related to the company. Thus, she did not review or dispose of matters related to it. 29 Del. C. § 5805(a)(1). It had advertised the equipment but had not received any “bites.” Because the equipment was outdated and undesired, the firm offered to give it to her, if she would remove it from their property. “Gift” generally means nothing is expected in return. However, as this “gift” carried the condition that she had to remove it, it would no longer be a gift, but a “thing of value.” The restrictions on accepting anything of monetary value are the same as accepting a gift. Acceptance may not result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public’s confidence in the integrity of its government. 29 Del. C. § 5806(b). As her duties did not involve matters pertaining to the company, she was not in violation of 29 Del. C. § 5805(a)(1). Since she had no dealings with the company in her State job, she could not show it preferential treatment. No facts suggested she was being shown preferential treatment as any person who wanted the equipment could have it, if they removed it from the property. To reduce any appearance that she was trying to somehow trying to obtain a benefit because of her State job, she had offered to pay. The Commission held that she should reiterate the offer to buy, but if the company did not want a payment, she could accept under these particular conditions.

**07-01 – Payment of Expenses:** A State employee had expenses paid by a private firm. The firm had responded to a request for proposals from her agency that was posted on its web site. Bids were due in 2005. After the bids, her job on the contract was to collect the score sheets of the various private enterprises that bid from the selection committee. Prospective vendors made presentations in January 2006, and the firm was awarded the contract effective January 2006. The contract expired in 2010. However, the employee said renewals would be

considered prior to that time and her agency might extend the contract. The firm recently asked her to make a presentation at its annual meeting on Delaware's procurement process because her job was to keep focus groups informed on State contracts. She said she attended the annual meeting on her own time, not State time. She had never attended this type of event in the past. At the conference, the firm gave her an award recognizing the performance of her duties in dealing with vendors and in assisting the "focus group."

No facts suggested her judgment would actually be impaired; she would actually give preferential treatment; or make official decisions outside official channels, to benefit herself or the private firm, which is prohibited by 29 *Del. C.* § 5806(b)(1), (2) and (3). The fourth criteria was whether acceptance may have an adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(b)(4). It is basically an "appearance of impropriety" standard. See, e.g., *Refine Construction Company, Inc. v. United States*, U.S. Cl. Ct. 12 Cl. Ct. 56, 62 (1987) (interpreting federal restriction prohibiting "any adverse effect on the public's confidence in its government." No actual violation is required. *Id.* We have noted that when a private source pays a public official's expenses, it may evoke at least two ethical concerns in the minds of the public:

(1) It may appear to the public that the official may be beholden to the private interest and prone to provide decisional "favors" in return. *Commission Op. No. 97-33 (citing Sanjour v. EPA*, US. Court of Appeals (D. C.) 56 F. 3d 85, 94 (1995)).

(2) Even if there was no reason to suspect the private payor was trying to curry favor with the official whose expenses were paid, the official's acceptance of benefits from a private source may create at least the appearance that the official is using public office for private gain. *Id.*

The Commission held that while she had not done anything improper, to avoid even the appearance of impropriety in the future, she should not accept payment of expenses from vendors with whom she did business.

**06-46 – Gift from a Former Client:** A State employee asked if it was appropriate to accept a gift from a former client. She participated in the mediation of the client's claim and the matter was resolved. After resolution, and the client was no longer a client of the agency, a perishable gift was delivered to her. She had no expectation any gift was going to be tendered. She did not keep the gift as a personal gift, but made the perishable items available to all employees in her agency. She said she could recuse herself in the future on matters related to this client should he ever return on a new matter. The Commission found no violation. However, to avoid even an appearance of impropriety in the future, she should not accept gifts from clients.

**01-15 – Tickets to a Fundraiser:** A senior level officer, who routinely decided if certain entities would receive State funding, accepted fund-raiser tickets, hosted by an entity which had matters pending before the official. He had no official duties to perform at the event. He said the agency would not have paid for his ticket as part of his official duties because "as a Division, we explicitly do not support fund-raisers." Based on the following law and facts, the Commission held that it was improper for him to accept tickets to the fund-raiser. Therefore, the full ticket value (\$60) should be re-paid to the gift giver.

The Code of Conduct restricts accepting gifts or anything of monetary value if acceptance may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5805(b). The fourth criteria is basically an appearance of impropriety test. *Commission Op. No. 96-72*. The Code also prohibits State officers from using public office to secure unwarranted privileges, private advantage or personal gain. 29 Del. C. § 5806(e).

The invitation offered four options for those who wished to attend. He initially planned to attend and pay \$40 out of his own pocket because he had a "personal interest" in attending. When he called to RSVP and buy the \$40 ticket, the company offered him a free ticket valued at \$60. That ticket permitted him to not only attend the performance, but a pre-show cocktail party. He said it was offered to him as an opportunity to "represent the Division." He knew it was a fund-raiser and knew the Division did not sanction official attendance at fund-raisers. He accepted the upgraded ticket, and attended. The event occurred on April 19, 2001, and the company had recently submitted grant applications to his Division, with a decision to be made in early May 2001.

In a prior opinion to his Division, we said that where private sources offer to pay for government officials, who have decision making authority over them, it can raise ethical concerns. *Commission Op. No. 97-33* (citing *Sanjour v. Environmental Protection Agency*, U.S. Court of Appeals (D.C.), 85, 94 (1995) (interpreting federal ethics restrictions on accepting payment from private sources for performing official duties)). Two ethical concerns noted in *Sanjour* are:

(1) when a public employee accepts benefits from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide "favors" in return. *Id.* Here, the private party had an immediate interest in his decisions. It had recently submitted applications for a final decision in May. While he said the timing was a coincidence, it could appear that the company was attempting to curry favor. It offered him tickets as "an opportunity to represent the Division." Based on that statement, the tickets were offered because of his official position. However, he knew "as a Division, we explicitly do not support fund-raisers." By attending when their offer was based on his representing the Division, it may raise the appearance of the Division's stamp of approval on that company's fund-raiser, when that is contrary to the Division's policy.

(2) even if there is no reason to suspect that the private party is trying to curry favor with the employee when expenses are paid by a private source, the employee's acceptance of such benefits may raise the appearance that government employees are using public office for private gain. *Id.* We specifically said in a prior opinion to his Division that when a private source, which does business with his agency, pays for persons from his Division to attend performances, cocktail parties, etc., and there is no official evaluation to be performed, that it could well raise the appearance that they are using public office for social gain. *Commission Op. No. 97-33*. Here, he said he initially intended to pay \$40 for one ticket to attend the performance only because of his "personal interest." That was what the event was worth to him when it was going to be out of his own pocket. However, when an upgraded ticket was offered, he accepted a ticket of increased value. Clearly, he personally gained from the transaction. He saved himself the \$40 and obtained a free \$60 ticket, which had the additional benefit, valued at \$20, of attending the pre-show cocktail party. He noted that there were two "more lavish options." Just because he did not accept *the most lavish* option does not mean that he did not

personally benefit. Moreover, he accepted that benefit on the basis of his official status, as the ticket was offered as “an opportunity to represent” his Division. As the Division specifically did not sanction fund-raisers, it could well appear that he used his public office to obtain unwarranted privileges, private advantage or gain. The Code of Conduct specifically prohibits such conduct. 29 Del. C. § 5806(e).

He said he was willing to repay \$40, but did not think he should have to repay \$60. His rationale was that the event was a fund-raiser; and (1) his agency does not sanction official attendance at fund-raisers and therefore would not pay or reimburse him; and (2) he personally should not be expected to repay it because otherwise he would have to support all fund-raisers. We disagree with that rationale. He received the full benefit of the ticket--not just the performance which would have cost \$40--but the benefit of participating in the pre-show socialization, etc. As he received the full value, that is the value that must be repaid.

He also said that attending these events takes time away from his family. We understand that the nature of his work requires him to attend many functions in the evening that are officially sanctioned. This was specifically **not** a State sanctioned event. Moreover, from his statement, he only planned to buy one ticket from the very beginning. Thus, the State job did not take him away from his family, it was his own personal decision.

For the reasons detailed above, at a minimum, it appeared that acceptance may result in: impaired judgment or preferential treatment as the company had matters pending at the time of acceptance; an appearance that the company was trying to curry favor from him because of his official position when it knew it had matters pending; and the appearance that he may have used public office to secure unwarranted privileges or personal gain. Accordingly, the full value, \$60, must be repaid.

**01-13 – Soliciting from Private Sources:** A State agency asked if it could solicit pharmaceutical companies to pay for a graduation ceremony for one of its programs. Based on the following law and facts, the Commission concluded that such conduct would violate the Code of Conduct and that a waiver could not be granted.

State employees may not accept payments of expenses, gifts, or anything of monetary value if it may result in: (1) impaired independence of judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public’s confidence in the integrity of its government. 29 Del. C. § 5806(b).

First, the above statutory language does not authorize any soliciting. *Commission Op. No. 00-37*. The General Assembly has only given seven agencies authority to solicit funds from private sources. *Id.* This department was not one of them. *Id.* As the General Assembly clearly and specifically identified agencies that could solicit from private sources, we held that had the General Assembly intended this agency to have specific statutory authority to solicit private sources it could have so provided. *Id.* Moreover, had the General Assembly intended that under the Code of Conduct it would be permissible for State employees to solicit, it could have said so. *Id.* However, the Code of Conduct gift law does not mention any authority to solicit. We have held that where the legislation is silent, we cannot graft words onto a statute because to do so would be creating law. *Commission Op. No. 95-01*.

Second, even assuming we could graft such language onto the statute, we have held

that it would be improper for an agency to have expenses paid by pharmaceutical companies when the State employees had significant indirect decision making authority. *Commission Op. No. 96-78*. Here, the persons who would benefit from the soliciting have more direct authority regarding which pharmaceutical companies products may be used. *Id.*

The companies would be solicited to pay for a post-graduate ceremony for persons completing their residency requirements, their guests, agency staff, and University who teach and train the residents. The plan was to seek the funds from several of the larger pharmaceutical companies. The expected costs would be \$3,000 for a dinner, speakers, door prizes, etc. The request said their State budget, in its employee recognition fund, only allows \$25 per person for a total of \$275. In effect, the requestor wanted the pharmaceutical companies, which did business with his agency, to supplement his State budget. That could raise an appearance that the companies which were solicited and pay for the party might receive preferential treatment in decisions to be made about which pharmaceutical company's products might be used. It may also raise the appearance that public office is being used for unwarranted privileges or private gain because these State employees, their guests, etc., would receive a greater benefit than other State employees who stay within their budget for "Employees' Recognition."

A waiver was sought so that private funds could be solicited. We can only grant a waiver if the literal application of the law is not necessary to serve the public purpose or there is an undue hardship on State employees or a State agency. 29 *Del. C.* § 5807(a). The basis for the waiver was that the agency's budget was reduced this year, and that this was an event which is "a deep part of the American landscape," and is "given full honor year in and year out." However, the budget reduction was the same hardship that all State agencies have had to experience. Moreover, we understand that this event was not held at all last year. Further, the plain language of the statute does not include "soliciting" and the General Assembly has determined the budget amount that is to be used for "Employee Recognition." A waiver would, in effect, permit supplementing the agency's budget from private sources when the General Assembly has not authorized such activities by this agency. Considering those facts, we do not find an undue hardship and believe the literal application of the law is necessary to serve the public purpose.

**01-09 – Payment of Conference Fee:** A State officer, who was required to file an annual financial disclosure report, reported the value of a payment of a conference registration fee by a private company which did business with his agency. He also asked if acceptance would raise any ethical issues. The Commission concluded that: (1) the value was properly reported on his financial disclosure report; and (2) acceptance does not raise any ethical issues under the State Code of Conduct.

#### **(A) Financial Disclosure Law**

"Gift" includes "payment," and must be reported as a gift if the value is more than \$250. 29 *Del. C.* § 5812(o) and § 5813(a)(4)(e). However, it need not be reported if there was "consideration of equal or greater value." *Id.* "Consideration" generally means that something is given in exchange; it means recompense; payment; an act, forbearance or promise given by one party for an act or promise of another. *Commission Op. 96-52 (citing 17A Am. Jur. 2d Contracts §§ 133 and 114).*

We have held that where a private source paid fees for State officials to attend courses

to enhance their skills as a public officer, mere attendance at the sessions, without any requirement to perform any specific services, e.g., speaker, constituted “some consideration,” but not consideration “equal to or greater than” the value received. *Commission Op. No. 96-25*. The Commission is to be consistent in its rulings. 29 *Del. C.* § 5809(5) and § 5807(c). Consistent with that prior opinion, we found that there was consideration, but not of “equal or greater value,” as he was not asked to perform any specific services in return for the value paid. Therefore, he properly reported the value on his annual financial disclosure report.

### **(B) Code of Conduct**

Executive Branch employees may not accept payment of expenses if acceptance may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public’s confidence in the integrity of its government. 29 *Del. C.* § 5806(b).

The conference was directed at increasing his skills and knowledge in the area of technology for which he was responsible. The agenda reflected that during the conference, the majority of his time was spent on attending courses, rather than social activities. That diminished the possibility that he was using public office for “private perks.” See, e.g., *Commission Op. Nos. 97-07 & 97-33*. Further, the State paid most of the expenses of attending the conference--air travel, hotel, etc., while the private company paid only registration fee. We have noted that when the government pays for its employees to participate in official functions there is a presumption that the employees are then under the “watchful eye” of the agency. See, “*Guidelines for Public Officers*,” January 21, 1997 (citing *Sanjour v. Environmental Protection Agency*, D.C. App.Ct., 984 F.2d 434,445 (1993) (interpreting a federal ethics provision restricting payment of expenses)). In essence, the agency had determined that there was a need for his attendance at the conference. Also, he indicated that the company, while sponsoring the conference, did not use it as a forum to promote its products or services. Here, there were no recent or pending matters before his agency regarding any contract or business dealing with the company. He did not expect any such activity within the next year or more. This diminished the possibility that accepting the payment of expenses would impair his judgment in performing official duties or result in preferential treatment to the company, as there would be no occasion. See, e.g., *Commission Op. No. 98-26*. Accordingly, there was no violation of the restriction on accepting payment of expenses.

**01-06 – Tickets to the Grand Gala from a Lobbyist:** A State officer asked if it were proper to accept tickets to the Grand Gala from a lobbyist which lobbied his agency. Based on the following law and facts, his acceptance would raise an ethical issue.

State employees may not accept compensation, gifts, payment of expenses, other employment, or anything of monetary value if it may result in: (1) impaired independence of judgment; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public’s confidence in the integrity of its government. 29 *Del. C.* § 5806(b). Also, they may not use public office to secure unwarranted privileges, private advancement or gain. 29 *Del. C.* § 5806(e).

In interpreting similar federal regulations which address having expenses for government employees paid by private parties, the federal Court of Appeals (D.C.) noted that such payments can evoke at least two ethical concerns:

1. When a government employee accepts payment from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide regulatory “favours” in return. *Sanjour v. Environmental Protection Agency*, U.S. Ct. of Appeals (D.C.) 567 F.3d 85, 94 (1995).

2. Even if there is no reason to suspect the private payor is trying to curry favor with the employee whose expenses are paid, the employee’s acceptance of benefits from a private source may raise the appearance that the employee is using public office to secure privileges or private gain. *Id.*

Here, the tickets were given to him by a lobbyist. He and the lobbyist had been friends for years--played golf, etc. Despite those years of friendship, the lobbyist had never before offered the State officer tickets to events such as the Grand Gala. The State officer had recently been appointed to a senior level executive branch position. His agency had some decision-making authority over a company the lobbyist represented. Thus, it appeared that he was offered the tickets, not because of the longstanding friendship, but because of his State position. We point this out because it focuses on the reason for exercising caution when accepting things of value from a lobbyist.

When an organization is registered to lobby, the registration is a clear indicator that the organization has an interest in official decisions. *Commission Op. No. 99-05 & 99-17*. We have urged public officers to exercise “great caution” in accepting gifts or things of value from entities that have an expressed interest in official decisions. *Id.* Here, the organization represented by the lobbyist had identified its interests in official State decisions its lobbying registration, and there was a clear connection to its interest in decisions made by his department. His department worked with the organization represented by the lobbyist to negotiate certain State matters that impacted on the agency’s budget for one of its divisions. The division’s staff put the proposal together, negotiated with the organization, and then sent the budget to the State officer for final approval. There was a substantial amount of money involved. Moreover, if the organization did not fund the division’s budget at the level at which his agency had committed, then by federal regulation, the organization would have to shut down, which could cost it about a million dollars each day. Thus, there was significant decision-making authority by him relative to the organization, and it clearly had a significant interest in the outcome of his decisions.

Thus, the adverse effect on the public’s confidence in its government was that the offer could well have been made to curry favor in his decision making. Accordingly, we must find that acceptance, at a minimum, would raise an appearance of impropriety.

**00-38 – Donation from Licensee:** A private company offered to donate a large check to a State agency which had significant input into whether the company's license would be renewed. Also, agency employees served on a committee that monitored the company to insure compliance with requirements resulting from the resolution of a law suit. Based on the following law and facts, the Commission held that it would be improper for the agency to accept the donation. It based that conclusion on the following law and facts.

The Code of Conduct restricts acceptance of gifts or anything of value if acceptance may result in: (1) impaired independent judgment in performing official duties; (2) official decisions outside official channels; (3) preferential treatment to any person; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(b). The latter item

is basically an appearance of impropriety test. *Commission Op. No. 96-78*. We weighed the totality of the circumstances to decide if there is an appearance of impropriety. *Id.*

First, the Commission noted that the agency's staff had given considerable thought to the situation, in effect, making their own assessment of the impact if the contribution were accepted. The Commission was assured that acceptance would not actually impair the judgment of the employees or actually result in preferential treatment to the company. However, the agency was concerned about appearances that may be raised by acceptance. The Commission noted that public officers are entitled to a legal presumption of honesty and integrity. *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd*, Del. Supr., No. 304, Veasey, C. J. (January 29, 1996). However, the restriction on accepting things of value does not require an actual violation, only that acceptance "may result in" an adverse effect on the public's confidence. *Commission Op. No. 99-34*.

Here, another State issued permits to the company. However, the Division which was offered the check had significant input into the permit renewal process which could affect the company's operation. Its comments on permit renewal included a data assessment and a conclusion on whether the data showed concerns that could impact on the renewal. The problems identified when the permit was considered for renewal some years ago, resulted in the company paying a large settlement to both Delaware and another State. The settlement agreement required that the company's conduct be monitored by an advisory committee for compliance. Two Division employees were on that committee. During the past five years, while Division employees were on the monitoring committee, the company asked about the Division's programs. It was explained that the Division could obtain federal dollars for some programs, but there were never enough funds for all the programs in which the Division would like to become involved. The company asked for the Division's costs for the programs. The costs were provided. Subsequently, the company forwarded a large check to the Division, stating that its contribution was to fund certain programs which the agency administered. The contribution, if accepted, would result in a three-for-one dollar match from the federal government. The effect of the federal match would result in the contribution becoming almost 1/4 of a million dollars for the agency. The offer was made as the company's license was up for renewal. In fact, in the company's letter with the check, it said it had recently provided some updated data for consideration of its renewal. The Division was in the process of reviewing volumes of information to aid it in putting together comments on the company's operation based on the data the Division collects. It had hired outside consultants to review the materials, but it did not have to accept the consultants' view when providing its comments on the license renewal.

Based on those facts, accepting a significant contribution from a company which had matters being monitored by the Division, especially when the Division was preparing to comment on the permit renewal, may result in the appearance that the company was attempting to curry favor with the Division. It also could raise the appearance that acceptance may result in: impaired judgment in performing official duties; preferential treatment to the company because the contribution would triple the money available for the Division's programs; and/or it may appear that the Division could use its influence with the other State to affect preferential treatment for the company. Accordingly, it would be improper for the Division to accept the contribution.

**00-37 – Soliciting from Private Companies:** A State agency asked if its employees may solicit private companies, which contracted with it, to pay for a conference to be hosted by the

agency. The Commission concluded that such conduct would violate the Code of Conduct based on the following law and facts.

### **I. Applicable Law**

State employees are restricted from accepting anything of monetary value if acceptance may result in: (1) impaired independent judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5805(b).

### **II. Facts Applied to Law**

The agency was asked to host a conference that would be open to the public. Approximately 300 people were expected to attend. The agency wanted to finance the conference by soliciting private companies as sponsors. Their sponsorship category, and the amount of recognition the companies would receive, would be based on the amount contributed. At the highest level, certain sponsors would be solicited for \$10,000. They would be recognized as major sponsors in all promotional material; the company logo would be on the program brochure, registration brochure, and T-shirts. Additionally, those sponsors would have a free exhibit table; company name recognition at the beginning of the program; 30 scholarships for employees; and recognition as a lunch sponsor. At the lowest level, sponsors would be solicited for \$1,500. Their company logo would be on the program and registration brochures and a T-shirt. The agency identified a number of private companies to solicit. It contracted with most of them. It had gone through the list of companies with which it contracted, selecting a number of them to solicit. Other agency contractors were not selected. The solicitation calls would be made by such persons as the key assistants, policy advisors, Division Directors, and heads of sections. The money would be used to reduce registration costs, pay for food, beverages, guest speakers, use of facilities, etc. The beneficiaries of those contributions would primarily be the general public. However, as it was open to all women, some State employees may attend and receive the benefit. For example, State employees who comprised the agency's planning committee would be expected to attend and would receive the benefits. The estimated cost was \$100,000 for a one day event. The agency apparently did not want to incur the costs out of its budget.

While the Commission agreed that this particular conference was a worthy cause, the manner in which the agency planned to finance the event raised a number of concerns. First, the Delaware Code does not authorize this particular agency to solicit funds. A review of the entire Delaware Code reflects that where the General Assembly wanted an agency or one of its sections to have authority to solicit private sources, it has clearly and specifically done so. See, e.g., 14 *Del. C.* § 132(d) (Department of Education's Education Science in Motion Fund); 14 *Del. C.* § 3453 (DOE's Engineering and Applied Science Recruitment Fund); 29 *Del. C.* § 53 (State Archives Museum); 29 *Del. C.* § 3203 (Delaware Heritage Commission); 31 *Del. C.* § 303 (Division of Child Protective Services); 31 *Del. C.* § 405 (Delaware Children's Trust Fund); 31 *Del. C.* § 3203 (Delaware Heritage Commission). Thus, it appeared clear that the General Assembly intended to limited solicitation authority to only those seven (7) entities. This agency was not one of them.

Second, the agency planned to use fairly high-level employees to solicit. Even if we could graft solicitation authority onto the Code of Conduct statute, the limits on acceptance embedded in the gift provision raised further concerns. Specifically, it restricts acceptance if it may result in impaired judgment in performing official duties; preferential treatment; official

decisions outside official channels; or any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b) (emphasis added). The agency said it would not have those employees solicit a company which contracted with their specific Division or Section. That reduced the possibility of, or the appearance that, their judgment may be impaired in performing official duties (e.g., contract renewals with those companies, etc.). However, that would not dispel at least the appearance that persons in key positions--principal assistant, policy advisor, division director, and heads of various sections--"carry great weight" within the agency, and because of their status would be in a position to insure preferential treatment or official decisions outside official channels. Aside from raising suspicion among the public that acceptance may result in preferential treatment or official decisions outside official channels, this could put the companies in the awkward position of feeling coerced into contributing, or fearing penalization if they do not (e.g., no contract renewal or future business with the State).

Third, the agency planned to target only a selected group of its contractors. Delaware Courts have held that the award of State contracts "has been suspect, often because of alleged favoritism, undue influence, conflict and the like." *W. Paynter Sharp & Son v. Heller*, Del. Ch., 280 A.2d 748, 752 (1971). Those contractors who contribute would receive widespread publicity and recognition at a conference open to the public. Some contractors who were not selected, but had the resources to contribute, may view the decision to provide such publicity to select contractors as an unfair advantage or favoritism to those companies. Other companies who were not selected and would not have the resources to contribute could also see this publicity as an unfair advantage to companies with resources while they, because of their lack of resources, lost the opportunity to obtain publicity for their company. Moreover, the amounts designated to be solicited could play a role in "weeding out" the publicity opportunity for small companies who considered themselves competitors for State business. This is not to say that the State employees who decided which companies to target were showing preferential treatment or that they would in fact, if authorized to solicit, attempt to: (1) coerce businesses to give; (2) insure preferential treatment; or (3) make official decisions outside official channels, favoring those who contribute. However, the statute does not envision an actual violation. See, e.g., *Commission Op. Nos. 99-34 and 92-11*. Rather, it speaks to whether it "may result" in those effects.

Last, but perhaps most important, is that the Code prohibits conduct which may raise suspicion among the public that State employees are violating the public trust and engaging in conduct that would not reflect favorably on the State; and it prohibits conduct that may result in any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5805(a) and § 5806(b)(4). We have held that these two provisions are basically a test of whether the conduct would "raise an appearance of impropriety." See, e.g., *Commission Op. No. 96-78*. Accordingly, we must conclude that even if there were no actual violation, for the reasons stated herein the conduct could raise the appearance of: preferential treatment and official decisions outside official channels under the State Code of Conduct. Moreover, it could raise the appearance that the agency is trying to obtain, through this Commission, an authority to solicit which the General Assembly did not deem was needed by that agency.

**00-15 – Payment of Costs to Attend Private Association’s Annual Dinner:** The Commission concluded that it would not violate the Code of Conduct if a State officer accepted payment of his expenses from a private Association to be its guest at its annual meeting dinner. Funding for his agency came from the Association members rather than from the State's general fund. As the officer had raised the issue of this Association paying his expenses at a prior meeting, when we had no particular facts on which to rule, and he expected the

Association would offer to pay his costs to attend future events, this opinion should provide guidance not only on these particular facts but in making those future decisions.

### **(A) Restrictions on Accepting Things of Monetary Value**

The Code of Conduct restricts acceptance of other employment, gifts, payment of expenses or anything of monetary value if acceptance may result in: impaired independence of judgment in performing official duties; preferential treatment of any persons; official decisions outside official channels; or any adverse effect in the public's confidence in the integrity of its government. 29 Del. C. § 5806(b).

### **(B) Application of Law to Facts**

#### **(1) May acceptance result in impaired independent judgment?**

In deciding if an official's judgment in performing official duties was impaired, Delaware Courts look at the official's decision making authority and the events surrounding the exercise of such authority, including the timing of the decision, as it related to the outside interest that raised the question of a conflict. *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd*, Del. Supr., No. 304, Veasey, C.J. (January 29, 1996). In *Beebe*, it was alleged that an official's judgment was impaired in participating in a decision concerning a private entity. The Court noted the official's decision making authority over the entity, and pointed out that while the record was not clear when the relationship creating the conflict arose, that about two weeks after his favorable decision for the entity, the official's private employer announced a business arrangement with that entity. The Court held that the official should not have participated even though his comments were "neutral and unbiased."

Here, we placed his decisional authority as it related to the Association in the context of the events leading to the question of whether acceptance may impair your independent judgment. He nor his office regulated the Association, but it was registered as a lobbying organization. When an organization registers to lobby, it has clearly expressed an interest in matters over which State officials exercise decisional authority. *Commission Op. Nos. 99-05 and 99-17*. The Association membership consisted of persons from an industry which his office regulated. The Commission addressed his significant and constant regulatory authority over the industry in a prior opinion. *Commission Op. No. 99-52*. He confirmed that the Association did lobby his agency and the General Assembly on issues related to the particular industry and other issues every year. Thus, he routinely dealt with matters affecting the Association and its members. Two specific issues of interest to Association this year were: (1) legislation giving him more authority over the industry the Association members represent, and (2) legislation extending for five more years a particular program under the laws governing this industry. On the first matter, apparently he and the Association supported the legislation, but there was an indication of contention on the legislation from other lobbyists. He believed that arose from misunderstanding the law. No facts indicated that he was deciding issues on implementing that law at present or in the near future, or that it would be raised at Association's annual meeting. The second bill extended the life of an existing tax credit program. The Association's interest was in the tax credit for the industry it represented. His office's interest arose because it collected certain taxes from this particular industry. No facts indicated that extending the life of that law impacted his existing decisional authority. Also, similar legislation had been introduced to extend tax benefits to other businesses qualifying for a tax credit as a result of job creation

and economic investment in Delaware. Thus, extending the tax credits for those purposes was not unique to this industry.

Based on the facts, the Commission did not find that accepting payment of his expenses to attend the Association's annual meeting would impair his independent judgment in making official decisions concerning those issues known to be pending. We addressed the more general issue of whether acceptance raised any appearance of impaired judgment, etc., in Section (3) below.

### **(2) May acceptance result in preferential treatment or official decisions outside official channels?**

As head of a State agency with decisional authority impacting on the Association, which lobbied his agency, he was in a position to engage in preferential treatment or make official decisions outside official channels. However, there is a "strong presumption of honesty and integrity" in the conduct of public officials. *Beebe*. Moreover, there must be facts to substantiate actual or perceived preferential treatment or official decisions outside official channels. Here, no facts suggested that he had or would actually engage in such activities. Again, we addressed the more general issue of appearances of improper conduct below.

### **(3) May acceptance result in an appearance of impropriety?**

The restriction on accepting things of monetary value if acceptance may result in any adverse effect in the public's confidence in the integrity of its government is, in essence, an appearance of impropriety test. *Commission Op. No. 91-12*. In a prior opinion where a lobbying organization paid an official's expenses, some Commission members "struggled" with the appearances when officials accept things of monetary value from lobbying organizations. *Commission Op. No. 99-05*. However, the Code does not ban gifts from lobbyists, so the question of appearances raised when accepting gifts from lobbyists is the same as when any private source makes such offers. They are: (1) the official may be beholden to the private interest and prone to provide "favours" in return; and (2) even if there is no reason to suspect the private payor is trying to curry favor, the employee's acceptance of benefits from a private source may raise the specter that he is using public office for unwarranted privileges, private advancement or gain. To evaluate whether acceptance resulted in such improper appearances, we look at the totality of the circumstances. *Commission Op. No. 96-78*.

His decisional authority and dealings with the Association on a routine basis on matters of interest to the Association and its members, placed him in a position where he could provide "favours." However, we balanced that fact against other relevant facts, which included: (1) the nature and status of the matters of interest to the Association; (2) the nature of the Association's event; (3) the reason his attendance; etc.

The facts did not indicate that the Association's annual meeting would provide a significant chance to lobby him on any matters; the legislation over which there was contention had been passed; the other legislation extended existing law and was not unique to the banking industry; and no facts indicated any pending decisions on those matters. Also, the occasion was not a purely social activity, but was an annual meeting with an afternoon of speakers and panel discussions, followed by a reception and dinner with speakers. While he could not attend the afternoon business sessions, he would attend the reception and dinner at the Hotel du Pont. No facts indicated the value or lavishness of the event. Obviously, the du Pont Hotel is known for its fine dining, etc. We assumed the event would include fairly typical fare for such events,

rather than a lavish dinner and evening of entertainment. Although his State agency was paying for two other persons from his office to attend and could pay the cost of his attendance, his agency's funding came from the Association's members, not the public's tax funds. No facts indicated that accepting payment from the Association for this particular event under those circumstances would raise the specter that he was using public office for unwarranted privileges, private advancement or gain. Based on all those facts, it would not raise an appearance of impropriety for him to accept payment of his expenses to attend the Association's annual meeting.

**00-07 – Gift to Stay at a Hotel:** A Senior Level Executive Branch official received a gift certificate for services at a hotel. The certificate was signed as being from the hotel staff, but the officer said the manager gave it to him as a holiday gift. The manager was on an Advisory Board that worked with the public officer's office on certain matters. The officer, who headed the agency, had concerns about a possible appearance of impropriety. If acceptance appeared improper, the officer intended to return the certificate. Based on the following law and facts, the Commission concluded that acceptance may, at a minimum, raise an appearance of impropriety, and the officer returned the gift.

State officers may not accept gifts if acceptance may result in: (1) impaired judgment in performing official duties; (2) official decisions outside official channels; (3) preferential treatment to any person; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(b). The Code also prohibits State officers from using public office to obtain unwarranted privileges, private advancement or gain. 29 *Del. C.* § 5806(e).

As head of the agency, the officer's statutory duties included responsibility for, among other things, matters that had a significant impact on the hotel. (Citation Omitted). Also, by statute, appointees to the Advisory Board to which the manager was appointed, served in an advisory capacity to the Director and their responsibility was to "consider matters relating to..." the responsibilities of the Director. (Citation Omitted). The hotel had a vested interest in those matters. Also, the agency put together seminars and used hotel facilities for those seminars. The hotel could have an interest in being selected as the site for such seminars. When private parties pay the expenses or give gifts to public officials, it can evoke at least two ethical concerns:

1. When a government employee accepts payment from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide "favors" in return. *Sanjour v. Environmental Protection Agency*, U.S. Ct. of Appeals (D.C.) 567 F.3d 85, 94 (1995).

2. Even if there is no reason to suspect the private payor is trying to curry favor, the employee's acceptance of benefits from a private source may raise the specter that he is using public office for unwarranted privileges, private advancement or gain. *Id.*

Here, the hotel had an interest in insuring that its interests were advanced. In fact, the officer noted that the hotel was a "significant player." Because of his statutory duties, his decisions could directly impact on the hotel's interests. Since the hotel's manager was on the Advisory Board, it may appear to the public that the hotel wanted to curry favor in decisions made by him. Also, as his office selected hotels as the location for some of its seminars, other hotels or the public may believe his acceptance of a gift certificate worth more than \$250 from the hotel was an endorsement of that hotel, or believe it would receive preferential treatment in decisions by him and his staff. Even if the hotel were not trying to curry favor, we have noted

that the more lavish the gift, the more it may raise the appearance that State employees are using public office for unwarranted privileges, private advancement or gain. Here, he was offered the opportunity for services at what may be one of the best hotels not only in Delaware, but in the region.

Whether acceptance may result in any adverse effect on the public's confidence in the integrity of its government, turns on the totality of the circumstances. *Commission Op. No. 96-78*. Moreover, the Code does not require an actual violation, only that the conduct "may raise suspicion" that the public trust is being violated or "may result in" impaired judgment, preferential treatment, etc. *Commission Op. No. 99-34*. Thus, even where the gift giver has no intent of currying favor, we balanced that fact against the other facts, which were that his position gave him the authority to make decisions that could significantly impact the hotel's concerns. Here, acceptance "may raise suspicion" that: his judgment could be impaired; he could give preferential treatment; or make official decisions outside official channels to benefit the hotel. Also, because of the nature of the gift, it may raise suspicion that he was using public office for unwarranted privileges, private advantage or gain. Because acceptance may have raised such suspicions, he was advised to return the gift.

**00-13 – Payment of Family Expenses:** A private enterprise paid the expenses for an Executive Branch official to attend and speak at its annual meeting. Based on the following law and facts, we concluded that: (1) the value of the payment for lodging for his family should be reported as a "gift;" and (2) accepting the payment does not raise an ethical issue under the Code of Conduct.

### **I. No Consideration for Expenses of Family Members**

Public officers must report gifts valued at more than \$250 under the financial disclosure law. 29 *Del. C.* § 5813(a)(4)(e). Executive Branch Officers must also report gifts of more than \$100 from a single source. E. O. No. 5 ¶ 1. "Gift" includes payment or anything of monetary value, unless consideration of equal or greater value was given. 29 *Del. C.* § 5812(o) and E. O. No. 5 ¶ 3.

The public officer agreed to speak at the annual meeting to emphasize to the industry the attributes of doing business in Delaware. He also brought his family. He paid for all meals and expenses of the trip, except for two nights lodging, which was paid for by the private organization and valued at \$897.92. It was assumed that the cost of lodging would have been less if he attended alone.

His agreement to attend and speak in return for payment of his own expenses constituted "consideration," which we found to be equal to or greater than the value paid for his trip. *Commission Op. No. 99-17*. However, if the private source also paid expenses for a spouse or friend who was not performing an official function, then the value of that part of the payment was a "gift." *Commission Op. No. 97-33*. Thus, under 29 *Del. C.* § 5813(a)(4)(e), the value of lodging for his family members would be reported in the financial disclosure report if it exceeded \$250; and, under E.O. No. 5, reported in an addendum if it exceeded \$100. His request cited a prior opinion where payment of his expenses of \$2,424.46 for air travel in return for going to, and speaking at, a meeting were found to be adequate consideration, and therefore not treated as a gift. The Commission must base its opinions on the particular facts of each case. 29 *Del. C.* § 5807(c). It is not enough to compare other trips based solely on the dollar amount, because the issue of "consideration" is whether something of adequate value is given in return under the specific facts of each case. In the prior opinion and this opinion, we

concluded that he gave consideration for his expenses. The difference here was the payment of expenses for his family, not for him, for which we found no consideration.

## II. Were any Ethical Issues Raised?

The Code of Conduct restricts acceptance of gifts, payment of expenses or anything of monetary value if acceptance may result in: (1) impaired independence of judgment in performing official duties; (2) preferential treatment of any persons; (3) official decisions outside official channels; or (4) any adverse effect in the public's confidence in the integrity of its government. 29 Del. C. § 5806(b).

The correspondence indicated that he had no direct or immediate decision making authority over the private organization, and no facts were given to indicate the possibility of preferential treatment or official decisions outside official channels. Thus, the issue was whether acceptance may result in an adverse effect in the public's confidence in the integrity of its government. To decide if acceptance adversely affected the public's confidence in the integrity of the government, we looked at the totality of the circumstances. *Commission Op. No. 96-78*. This is, in essence, an appearance of impropriety test. *Commission Op. No. 91-12*. In several past opinions, we noted that when private parties paid the expenses or gave gifts to public officials, it could evoke at least two ethical concerns regarding appearances:

1. When a government employee accepts payment from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide "favours" in return. *Sanjour v. Environmental Protection Agency*, U.S. Ct. of Appeals (D.C.) 567 F.3d 85, 94 (1995).

2. Even if there is no reason to suspect the private payor is trying to curry favor, the employee's acceptance of benefits from a private source may raise the specter that he is using public office for unwarranted privileges, private advancement or gain. *Id.*

In this instance, any appearance of impropriety was negated by the following facts: he had no direct or immediate decision making authority over the private organization; it did not appear that the private organization was attempting to curry favor with him as he had no decision making authority over it; he paid for all expenses associated with his family's trip except for lodging; while the conference ran from June 3 to June 6, he and his family were only there on June 5 and 6; part of that time he was fulfilling his speaking agreement; no facts indicated that the two days were spent in purely social activities provided by the private organization; and he will report the value of his family's lodging. Placing those facts within the total circumstances, we found no appearance of impropriety.

**00-03 – Trip to a Foreign Country:** A public officer's expenses for a trip overseas were paid by an Institute. The Institute, in cooperation with the Council of State Governments Eastern Regional Conference (CSG-ERC) put the seminar together for government officials from a number of States. The State of Delaware was a dues-paying member of CSG-ERC, which was a multi-state organization that assisted states with multi-state and regional solutions on legislative, economic, and other matters. As part of CSG's activities, it put together international programs which consisted of seminars, technical assistance programs and citizens' exchanges. The international programs were coordinated through the standing international committee, which supported the expanding role of states in international trade, economic development and other global activities.

The schedule reflected that most of the officer's time during the days and some evenings entailed participating in various events, e.g., briefings, tours of various locations, home hospitality with foreign counterparts, etc. There was some free time, but much of it was in the early evening before other scheduled events, such as when the officer had free time from 5 p.m. to 7 p.m., followed by a scheduled dinner and discussion for the participants and the foreign hosts, starting at 7 p.m.; and on another day when the officer had free time from 5 p.m. to 8 p.m., followed by a scheduled dinner meeting with senior officials from the foreign country at 8 p.m. In addition to the official schedule, the officer was asked by another Delaware official to add a specific activity, if time permitted, such as visiting a hospital in the foreign country. The officer added that to her schedule.

To decide if any ethical issues are raised by accepting things of value, the standard applied is whether acceptance may result in: (1) impaired independence of judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b).

No facts indicated that the officer had any decision-making authority over the Institute or could give it preferential treatment or make official decisions outside official channels. Thus, the question was whether acceptance may result in any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b)(4). This is basically an appearance of impropriety test. *Commission Op. No. 97-42*. The test for an appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the official's ability to carry out official duties with integrity, impartiality and competence is impaired. *In re Williams*, Del. Supr., 701 A.2d 825 (1997). While *Williams* interpreted the Code of Judicial Conduct, such interpretations may be used as guidance to interpret the State Code of Conduct because the subject (ethics) and the standard (appearance of an ethics violation) apply to public officers in both instances. See, *Commission Op. No. 95-05 (citing Sutherland Stat. Constr. § 45-15, Vol. 2A (5th ed. 1992) (decision on statutory construction has relevance if both statutes are such closely related subjects that consideration of one naturally brings to mind the other)*.

In deciding the appearance of impropriety issue, the Commission looked at the totality of the circumstances, such as the reason for attending, the activities engaged in while attending, etc. See, e.g., *Commission Op. No. 97-23 and 97-42*. Because the officer had no decision making authority over the Institute; the purpose of the trip was educational in nature which served to benefit, not the gift giver, but the State; and the agenda reflected a trip primarily focused on official activities, with little free time, we concluded that no ethical issue were raised by acceptance.

**00-01 Fruit Basket from Law Firm:** As the manager of a State program, a State employee had routine and direct contact with both the lawyers and their clients who applied for a program. To receive the program benefits, the lawyers and their clients completed and submitted an application. The employee reviewed the applications and advised applicants and/or their attorney if more information was needed. Upon receipt of the information, the State employee went before a panel and advised it of the details of the application. Neither the individual who was applying, nor their attorney appeared before the panel. The panel then recommended to the appropriate Division Director whether the application should be approved. The Division Director made the final decision.

Shortly before the December holidays, an out-of-State law firm, which was representing a client who submitted an application, sent a gift basket, valued at approximately \$30, to the State employee. This was the first time this out-of-State law firm had represented a client on such matters before the State. Thus, there was no past experience with them. Delaware law firms with which the State employee normally dealt had never sent such gifts. Before the gift was received, the State employee had already advised the panel of the details of the application and it had recommended to the Division Director that the application be approved. That recommendation was made three days before the gift was received. To the State employee's knowledge, the law firm was not aware that a favorable recommendation had been made at the time it sent the gift.

As the State employee was concerned about accepting the gift, she contacted her supervisors, who contacted this Commission's legal counsel. It was explained that the decision of whether it would be proper to accept the gift must be made by the Commission, based on the particular facts. However, in reviewing the statute and prior Commission decisions, it appeared that acceptance might, at a minimum, raise concerns. As the gift was perishable, rather than being returned to the out-of-State gift giver, it was donated to a local shelter, pending the Commission's final decision.

Under the Code of Conduct, State employees are restricted from accepting gifts if it may result in: (1) impaired judgment in performing official duties; (2) official decisions outside official channels; (3) preferential treatment to any person; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b).

At the time she provided the panel with information on the application, the gift had not been received, nor was she aware that it was being sent. Thus, at the time she was performing her official duties, her judgment would not have been affected by the gift. Further, no facts indicated that acceptance resulted in any official decisions outside official channels; or that any preferential treatment was given. However, the admonition against accepting gifts which may result in any adverse effect on the public's confidence in its government, is basically "an appearance of impropriety" test. *Commission Op. No. 98-31*. It does not require that the law actually be violated, only that it raise the appearance of improper conduct. *Commission Op. No. 99-34*. Although she did not make the final decision on the application, she routinely dealt with persons who applied; reviewed the applications; decided if the application complied with the filing requirements; and presented her conclusion to the panel. In performing those tasks, she dealt directly with the applicants and/or their attorneys and made the presentation to the panel. The applicants/attorneys did not appear before the panel to plea their own case, so her input on whether the applications complied with the rules was significant. Thus, as the program manager, she had significant decision-making authority over whether the applications complied with her agency's rules and regulations. Therefore, it may have appeared to the public that her judgment could be impaired by receiving such gifts; that she could engage in conduct that would result in preferential treatment, etc. No facts indicated that those events occurred, but in light of her significant role as the program manager, we concluded that accepting such gifts, at a minimum, may result in an adverse effect on the public's confidence in its government. Here, while the gift may have a relatively small value, it was given to the program manager, by a law firm which had a matter pending when it sent the gift. The public may suspect it was offered to curry favor or preferential treatment. Moreover, accepting a gift from this applicant's law firm may raise suspicion among other applicants that if they want favorable treatment they should be giving gifts. In this case, the gift basket was sent to a local shelter as it was perishable so

returning it to the out-of-State law firm may not have been feasible. Neither she, nor any State employee, personally gained from the gift.

Because of the issues such gifts raise, and to avoid the possibility of such gifts in the future, it is our advice that the law firm be notified that no such gifts should be given in the future, and if they are received, should be returned.

**99-52 – Point to Point Tickets:** A company, regulated by the State, gave two tickets to Point-to-Point at Winterthur to a State officer who was involved in regulating the industry of which the company was a part. The Commission concluded that the tickets should be reported under the financial disclosure reporting law, and that acceptance raised ethical issues for the reasons detailed below.

#### **A. Financial Disclosure Law**

Under the financial disclosure law, gifts valued at more than \$250 are to be reported unless consideration of equal or greater value was given. *29 Del. C. §§ 5812(o) & 5813(a)(4)(e)*. The two tickets were valued at \$681.50. He attended the event because he was encouraged to develop good relations with the regulated industry, due to its importance to the State's economy, and such events were attended by persons who previously held his position. The motive prompting one to enter an agreement is distinct and different from "consideration." *Commission Op. No. 96-26 (citing 17A Am. Jur. 2d Contracts § 115)*. As "motive" is not "consideration," and no facts indicated that anything was given in return, then the item is a "gift" and reportable under the financial disclosure statute and the Executive Orders. *Id.* Here, no facts indicated that he gave anything in return. Accordingly, the source and value would be reported as a gift in his annual financial disclosure report.

#### **B. Are Ethical Issues Raised by Acceptance?**

When gifts are reported pursuant to Executive Orders 5 & 19, we decided whether any ethical issues were raised by acceptance. E.O. No. 19 ¶ 2. To decide if accepting a gift raised ethical issues, we applied the Code of Conduct. State officers may not accept any compensation, gift, payment of expenses or any other thing of monetary value under circumstances where acceptance may result in:

- (1) Impaired independence of judgment in exercising of official duties;
- (2) An undertaking to give preferential treatment to any person;
- (3) The making of a governmental decision outside official channels; or
- (4) Any adverse impact on the confidence of the public in the integrity of the government of the State. *29 Del. C. § 5806(b)*.

The Code also prohibits State officers from using public office to secure unwarranted privileges, private advantage or gain. *29 Del. C. § 5806(e)*.

By law, his official duties included responsibility for regulating the industry of the company. (Citation omitted). The statute also gave him authority to visit and examine each of the industry's institutions as frequently as deemed necessary or expedient. (Citation omitted). Thus, normally his official duties entailed exercising judgment on such matters as examinations over those institutions. However, the particular company in the industry was out-of-state and its own State was its primary state regulator. While his office would normally have concurrent

jurisdiction, it entered an agreement with other State regulators in the industry if they had branches in more than one state. Basically, the agreement was that the "home State" would be the primary regulator. Thus, his office did not examine the company. However, despite the agreement, the Commission noted that because it was a highly regulated industry; his authority as a Senior Level Executive Branch official could have a significant impact on how, and by whom, such companies would be regulated; and the company had identified its interest in Delaware's legislative and administrative actions by registering as a lobbying organization. Clearly, it, like other institutions in the industry, would be interested in administrative actions taken by his office. For example, his office regulated another company in Delaware, which was a small affiliate of the company giving the tickets. Also, by law, he collected certain fees from the company giving the tickets and its small affiliate in Delaware. (Citation omitted). The rate was set by State statute, and based on a percentage of the company's net income. (Citation omitted). In reviewing the payments, he had some latitude in deciding if the entity had submitted the proper amount. Specifically, by law, the assessment was to be reviewed and corrected by him upon application by any party involved. (Citation omitted). Thus, he reviewed the entity's statements and determined if the report complied with the statute. If a regulated entity challenged its assessment, by statute, he was charged with deciding if the assessment would be corrected. He had no recollection of the company or its Delaware affiliate submitting any application for an assessment correction. The assessments were reviewed at least on a quarterly basis. (Citation omitted).

The Point-to-Point was on May 2, 1999. It was not clear if quarterly tax reports by the company or its Delaware affiliate were pending review when the tickets were offered. Obviously, the timing of the gift could impact a determination of whether independent judgment would be impaired. However, even without that information, the Code restricts acceptance if it may result in any adverse effect on the public's confidence in the integrity of its government. We have held that this is basically an appearance of impropriety test. *Commission Op. No.96-78*.

In interpreting federal regulations similar to the State Code of Conduct, which address private parties paying for activities of government employees, the federal Court of Appeals (D.C.) noted that such payments can evoke at least two ethical concerns about appearances: 1) when a government employee accepts payment from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide regulatory "favors" in return. *Sanjour v. Environmental Protection Agency*, U.S. Ct. of Appeals (D.C.) 567 F.3d 85, 94 (1995); 2) even if there was no reason to suspect the private payor was trying to curry favor with the employee whose expenses were paid, the employee's acceptance of benefits from a private source may raise the specter that the employee was using public office for private gain. *Id.*

The Officer agreed that attending an event hosted by an entity over which he had decision making authority created a different appearance than if he attended an event hosted by an entity over which he had no decision making authority. That difference was indicated by the terms which require that we look at "whether acceptance would result in impaired independent judgment in performing official duties." We have held that where there is no official duty to make a decision over the gift giver, then judgment cannot be impaired. See, e.g., *Commission Op. No. 97-43*. Here, the gift was given by an entity regulated by him. Moreover, the assessment decision alone was an on-going issue before him. Beyond that, when the gift is to a rather lavish event, it also raises the concern in the mind of the public that the official may be using public office to obtain unwarranted privileges, private advancement or gain. See, *Sanjour* at 95-96 (noting the difference in appearance if a public employee accepts private payment for a

bus ride to a nearby city with a box lunch en route, as compared with a lobster dinner and a Lear jet to a far-off resort area). Here, the event was rather lavish with food, drinks, etc., set up in a special tent for the company to entertain its invited guests. Those were not tickets which the general public could obtain. Thus, it could appear that the gift giver was trying to curry favor or that he was receiving a "private perk" from a company which had a substantial interest in the decisions made by him. Based on the facts, we concluded that acceptance was improper because it raised an appearance of impropriety. However, based on the particular facts, he was not required to repay the company because he was not aware of the value of the tickets when he accepted them; officials who previously held his position attended such events which affected his decision to accept the tickets; he was encouraged by higher level officials to develop good relations with the industry because of its importance to Delaware's economy; and upon learning of the value of the tickets and reviewing our opinions which raised some concerns in his mind, he immediately came to the Commission for a ruling. However, we caution that: (1) as he was entitled to rely on the gift givers' value, he should always be alert to ascertaining the value when offered anything of monetary value; (2) participation in certain events by officials who previously held the same job does not negate the fact that the Code of Conduct places the responsibility on each individual State employee or officer to comply with the law; and (3) while he may be encouraged to develop good relations with the industry, when an entity which is regulated by his office pays for him to socialize with its officials and representatives at a rather lavish event, that is apparently by invitation only, it can take on appearances beyond developing good relations for the reasons stated herein.

**99-50 – Briefcase and a Painting:** A State officer accepted two gifts valued at more than \$250 each: (1) a painting by a local artist; and (2) a briefcase from a national association. Based on the following law and facts, we found: (a) the source and value of the painting should be reported as a gift on his annual financial disclosure report; (b) the source and value of the briefcase need not be reported as a gift on that report; and (c) no ethical issues were raised by the acceptance of either item.

**Financial Disclosure Requirements:** Under the financial disclosure law, the source and value of "gifts" valued at more than \$250 must be reported. 29 *Del. C.* § 5813(a)(4)(e). "Gift" includes "anything of value." 29 *Del. C.* § 5812(o). Here, the estimated values were: \$700 for the painting; and \$310 for the briefcase. However, an item is not a "gift" if consideration of equal or greater value is given. 29 *Del. C.* § 5812(o).

(A) The Painting

Traditionally, the local artist gave Senior Level officials an original painting before they left office. The State officer planned to take the painting and other personal belongings when his term ended. No facts suggested that he gave anything in return for the painting. As he gave no consideration, the item, its source, and its value had to be reported.

(B) The Briefcase

The national association gave the briefcase to him as a token of its appreciation for his work as its Chair. As Chair, he managed the organization's activities, such as forums on education reform, tobacco litigation settlement, served as host when the organization met in, Delaware, led its efforts to inform Congress on certain issues, etc. Many hours were spent on those functions. The Commission has held that where a State official was an officer of a national organization and was expected to participate in planning organizational activities,

preside over meetings, attend and participate in the organization's activities, etc., that the actual performance of those duties was "consideration of equal or greater value" where the "thing of value" received was the costs of his travel, hotel, etc. *Commission Op. No. 96-40*. Here, the "thing of value" was a briefcase, but the exchange-performing the required organizational functions in return for something of value-was the same. To be consistent with our prior ruling, we found that his participation was equal to or greater than the value of the briefcase.

**Code of Conduct Requirements:** State officials are restricted from accepting "gifts" or "any other thing of monetary value" if it may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(b). As both items were "things of monetary value," the statutory provisions were applied as follows.

(A) The Painting

In his official capacity, he had no direct or immediate decision making authority over the artist. Where a State official has no decision making authority over the entity which gives them a thing of value, it is unlikely their independent judgment will be impaired or that the entity will receive preferential treatment in the official's decisions. *Commission Op. No. 97-43*. The remaining issue was if acceptance may create an appearance of impropriety, e.g., would it appear that he was using public office for unwarranted privileges or private gain, which 29 *Del. C.* § 5806(e) prohibits. Obviously, the painting was given because of the public office he held. By accepting, he privately gained the painting and its value. However, the gift was traditionally given to the occupant of the senior level position before the official left office, diminishing any perception that he used public office for unwarranted privileges or private gain.

(B) The Briefcase

Again, in his official capacity, he had no direct or immediate decision-making authority over the association. Thus, it was unlikely his judgment would be impaired or that the association will receive preferential treatment in his official decisions. *See, Commission Op. No. 97-43*. Again, the issue was whether acceptance may result in any appearance of impropriety. Based on the particular circumstances under which the "thing of value" was given--in return for performing duties as Chair of the association; and the fact that he had no decision making authority over the association--it did not appear that the item was given or accepted as a result of any special or unwarranted privileges or personal gain.

**Conclusion:** The painting should be reported as a "gift"; the briefcase need not be reported as a "gift"; and no ethical issues were raised by accepting those things of monetary value.

**99-46 – Recognition as an Alumnus:** A private foundation paid the expenses for a Public Officer to return to his alma mater to be a special guest speaker when he was honored as an alumnus. Based on the following facts and law, we concluded that the value need not be reported as a "gift" under the financial disclosure law and acceptance did not raise any ethical issue.

**Financial Disclosure Requirements:** The Foundation paid for travel, lodging, parking and dinner for two when he was honored as an alumnus and was the event's special guest

speaker. The total value was \$866.69. Under the financial disclosure law "gift" includes "payment" or "anything of value." 29 Del. C. § 5812(o). However, an item is not a "gift" if consideration of equal or greater value is given. 29 Del. C. § 5812(o). "Consideration" generally means that something is given in exchange. See, *Merriam Webster's Collegiate Dictionary*, p. 246 (10th ed. 1994) (consideration is a recompense; payment; an act, forbearance or promise given by one party in return for an act or promise of another); See also, 17A Am. Jur. 2d Contracts §§ 113 and 114. In return for paying his expenses, he attended the function and was a speaker. Where individuals serve as speakers such activity constitutes "some consideration". See, e.g. *Commission Op. No. 99-17*. Whether it was consideration of "equal or greater value" depends on the particular facts, e.g., length of the event, portion of event spent engaging in official activities versus portion of event not engaged in official activities. *Id.* Here, he left for the out-of-state event late in the afternoon, for an early evening reception. The ceremony at which he was introduced and spoke started an hour later. He stayed overnight and caught a 7:30 a.m. flight. Based on those facts, there was consideration of equal or greater value. Thus, the payment did not need to be reported as a "gift" on his financial disclosure report.

**Code of Conduct Requirements:** The Executive Orders required us to decide if any ethical issue was raised by acceptance. E.O. 19 ¶ 5. State officials may not accept gifts, payments of expenses, or anything of monetary value, if it may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b).

In his official capacity, he had no decision making authority over the Foundation and no dealings with it other than the opportunity to be guest speaker. Where a government official has no decision making authority over an organization which gives them something of value, it is unlikely that their independent judgment will be impaired or that the person will receive preferential treatment in the official's decisions. *Commission Op. No. 97-43*. Thus, the remaining issue was if acceptance created any appearance of impropriety. To decide if acceptance raised an appearance of impropriety, we looked at the totality of the circumstances. *Commission Op. No. 97-23*. Here, based on the reason for attending, the limited time spent as the organization's guest, the activities engaged in, that he had no decision making authority over the organization, etc., the acceptance did not raise any appearance of impropriety.

**99-39 – Payment of Expenses—Travel on Corporate Aircraft:** A Senior Executive Branch official notified the Commission that he accepted travel on a corporate aircraft under circumstances essentially identical to those addressed in a 1996 Commission Opinion. *Commission Op. No. 96-26*. The Commission must strive for consistency in its opinions. 29 Del. C. § 5809(5). As there were no distinctive factual differences between the 1996 situation and this situation, the Commission held that for the reasons given in its earlier opinion, the value should be disclosed in the official's annual financial disclosure statement and no ethical issues were raised by acceptance.

**99-38 – Payment of Expenses--Panelist at a Conference:** A Senior Executive Branch Official attended an out-of-state conference for government officials and business organizations. He was a panelist for an evening business session and participated in a morning business session to present the Executive Branch's perspective as part of the discussions. After the morning

session, he played a round of golf and then returned to Delaware. A private company which was also a registered lobbying organization, paid his expenses for overnight lodging, meals, and the round of golf, valued at approximately \$530. While the conference lasted for 3 days, he went late on Friday and returned on Saturday.

His dealings with the private firm in his official capacity, consisted of: regularly participating in meetings and forums sponsored by the private enterprise to discuss public policy issues; working with the private firm on public policy studies; and meeting with this firm, and other businesses and civic groups to present information on certain policy issues. Two issues were raised: (1) whether the value of his expenses should be reported under the financial disclosure law; and (2) whether accepting the payment raised any ethical issue under the Code of Conduct.

#### **(A) Financial Disclosure Law Evaluation:**

State officers must report gifts of more than \$250. 29 Del. C. § 5813(a)(4)(e). "Gift" includes payment or anything of value unless "consideration of equal or greater value" is given in return. 29 Del. C. § 5812(o). If it is a "gift" then it is to be reported; if sufficient consideration is given, it is not a "gift" and need not be reported. Based on the facts, there was "consideration of equal or greater value" given where in return for payment of his expenses, he participated in both the evening and morning business sessions. Although he received the additional benefit of playing a round of golf, the activity was not the primary focus of the time spent at the retreat. As there was consideration of equal or greater value, he was not required to report the payment as a "gift" under the financial disclosure statute. *Compare*, Commission Op. No. 96-07 & 96-37 (No consideration of equal or greater value where business meetings were incidental as compared to the majority of the conference time which was not directed at business).

#### **(B) Were any Ethical Issues Raised?**

The Code restricts acceptance of payment of expenses if it may result in: (1) impaired independent judgment in performing official duties; or (2) official decisions outside official channels; or (3) preferential treatment to any person; or (4) have any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b). The concerns addressed by the Code of Conduct restrictions are that when private sources confer benefits on public officials and those officials are responsible for agency related functions, it may, at least, raise an appearance of impropriety. *Commission Op. No. 97-33 (citing Sanjour v. Environmental Protection Agency, U.S. Court of Appeals (D.C.), 56 F.3d. 85, 94 (1995))*. Two ethical issues noted by the *Sanjour* court were: (1) when a public official accepts benefits from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide "favors" in return. *Id.* (2) even if there is no reason to suspect that the private party was trying to curry favor with the official, the official's acceptance of benefits from a private source may raise the appearance that government employees were using public office for private gain. *Id.*

In prior opinions, we noted that lobbying organizations, through their registration, have indicated a clearly expressed interest in the State's legislative and administrative activities. *Commission Op. Nos. 99-05 & 99-17*. We urged that caution be used in accepting benefits from such entities. *Id.* However, the question is if that interest in State decisions, based on the particular facts, may raise the appearance that the recipient was beholden to or prone to provide favors to the private enterprise. Here, it did not appear that the official had any decision-making authority over the private enterprise. It had no contracts with his agency. He advised the entity

and other private enterprises of various State fiscal issues. Thus, it did not appear that the interactions he described could result in official decisions about the private enterprise in which his judgment would be impaired or that he was in a position to give it preferential treatment or make official decisions outside official channels.

The issue of whether an official's acceptance of benefits from a private source may raise the appearance that such officials are using public office for private gain, must be considered based on the particular facts. While an overnight trip out-of-State and the accouterments (lodging, golf, and meals) valued at \$530 might be considered fairly lavish by some, the Commission also noted that he left Delaware late on Friday to participate as a panelist that evening. He did not seek the benefits of staying all three days; or payment of expenses for his spouse, although apparently the private enterprise would have paid those costs. On Saturday morning, he also participated in official meetings. At the end of those meetings, he played a round of golf before returning to Delaware that day. Based on the particular facts, we found no violation of 29 *Del. C.* § 5806(b).

**99-26 – Gifts to Employees from Former Boss:** A former State Officer asked if he could give his former employees a personal check to recognize their efforts as a State employee. His new employment was with a company which was regulated by the employees to whom he wanted to give the personal check. For the following reasons, the Commission held that it would violate the Code of Conduct for the State employees to accept a personal check from their former boss when his private employer was now regulated by those same employees.

State employees are restricted from accepting any gift, compensation or anything of monetary value if it may result in: (1) impaired independence of judgment in performing official duties; (2) official decisions outside official channels; (3) preferential treatment to any person; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(a).

The former employee had been the head of a section, and while employed by the State gave personal checks to each Employee of the Year in the amount of that year's last two digits. Shortly before leaving the State to accept a position with a private firm, which his former section regulated, he told his employees that he planned to continue the practice. Before that announcement, he asked for an opinion from the Commission on whether his post-employment conduct would violate the post-employment law. [He did not mention that he was planning to continue giving money to his former colleagues and employees.] At that time, he told the Commission that controversies had arisen regarding the private company and his section had to advise staff members and the agency's Cabinet Secretary on those matters. Also, there were other matters connected to the private company over which there had been "much controversy involving many parties." Also, he had a direct policy role in certain State matters pertaining to the company. He had been the "point person" on most matters dealing with the controversial issues. Further, the project was "on-going" and could be so for several months. The Commission found that he was directly and materially responsible for those matters while employed by the State and advised him that in accepting employment with the company regulated by his former agency, that he could not work on those matters "to insure undue influence is not exerted on those you leave behind, and to avoid any appearance of impropriety." *Commission Op. No. 98-12*. Thus, while controversies were still "on-going," he promised the employees who regulated the private firm that he was ensuring that his "Employee Recognition Fund" would continue "in perpetuity," when he knew: (1) he would be accepting employment with a company regulated by those same employees; (2) some matters were

controversial and were on-going; and (3) while he could not represent the company on matters for which he had been directly and materially responsible, it was possible he would represent the company before his former agency on new matters.

The Commission is required to be consistent in its opinions. 29 *Del. C.* § 5809(5). It was noted that when government employees accept money from private sources it raises at least two ethical concerns: (1) if the private party has an interest in the employee's decisions, it may appear that the employee is beholden to the private enterprise and prone to provide regulatory favors in return; and (2) even if the private payor does not have an interest in the official decisions, the employee's acceptance of payment from a private source may raise the specter that government employees are "selling" their labor twice--once to the government and once to the private party. This may create the appearance that the employee is using public office for private gain which is prohibited. *Commission Op. No. 97-10* (citing *Sanjour v. Environmental Protection Agency*, U.S. Ct. of Appeals (D.C.) 567 F.3d 85, 94 (1995)).

The promise of money to employees who regulated his company, when there were "on-going" controversies could adversely affect the public's confidence in the integrity of its government because the promise could appear to result in: impaired independence of judgment in performing their official regulatory duties; preferential treatment for his company; or undue influence exerted as a result of his former position as their supervisor. Aside from the appearance raised by the promise of money when specific controversies were pending, his former employees had an on-going responsibility to regulate the company even after those specific controversies were resolved. Thus, the act of giving the money could raise, at least, the appearance that their decisions on new issues would be influenced by his money and/or his former position, or that the company would obtain preferential treatment on new issues. Moreover, the Commission has held that accepting payment from private sources for performing State duties may raise the appearance that the State employees were in contravention of other laws. *Commission Op. No. 98-31*. Specifically, the Attorney General's office concluded that State employees were restricted from having their State salary supplemented by other sources because an "employee's services during the hours of employment belong to the employer whether prescribed by statute or by the express or implied terms of an employment contract." *Att'y Gen. Op. No. 83-1031*. Subsequently, the Attorney General's office concluded that aside from raising appearance issues under the State Code of Conduct, acceptance may also raise issues under other laws. *Att'y Gen. Op. No. 87-1024*. It noted that the Merit Rules restrict Merit employees from accepting salary supplements from private sources while on State time. See, *Merit Rule 5.0500*. Thus, if the Employee of the Year was a Merit employee and accepted compensation from a private source for performing State duties, it could appear that they were violating the Merit Rules. Such conduct could clearly have an adverse effect on the public's confidence in its government.

Also, the Attorney General's office noted that when a State employee accepts payment from private sources for performing State duties that, "criminal penalties may apply depending on the circumstances." *Att'y Gen. Op. No. 87-1024*. Specifically noted were the Bribery statute, the Official Misconduct statute, and the Receiving Unlawful Gratuities provision. The "receiving unlawful gratuities" provision prohibits public servants from soliciting, accepting or agreeing to accept any personal benefit for engaging in official conduct which the public servant is required or authorized to perform, and for which the public servant is not entitled to any special or additional compensation. 11 *Del. C.* § 1206. Here, the agency employees were required to regulate the company. No specific statute entitled them to any additional compensation. In fact, the Merit Rules appeared to specifically prohibit any additional compensation. Thus, acceptance may result in the appearance that the employees were violating a criminal provision.

Again, such conduct could clearly have an adverse effect on the public's confidence in its government. Where the Commission previously held that compensation by a private source could result in the appearance that the State employee was violating other laws, the Commission noted that its authority to grant waivers applied only to the State Code of Conduct. *Commission Op. No. 98-31*. Thus, it had no authority to waive other laws, such as those referred to above, which impacted on the appearance of impropriety. *Id.*

**99-20 – Tickets to an Exhibition:** A Division Director accepted two tickets valued at \$200 each from a private enterprise to attend an exhibition. The official could use the second ticket to bring a guest. Aside from viewing the exhibition, presentations were made by public officials, a meal was served, and there was entertainment. The issues were whether: (1) the tickets were to be reported under the financial disclosure statute; and (2) any ethical issue was raised by acceptance.

**(1) Was There "Consideration of Equal or Greater Value"?** Under the financial disclosure statute the value is reported as a "gift" unless there is "consideration of equal or greater value." 29 *Del. C.* § 5813 (a)(4)(e). The Commission must be consistent in its opinions. 29 *Del. C.* § 5809(5). "Consideration" generally means that something is given in exchange to the gift giver. *Commission Op. No. 99-26 (citing Merriam Webster's Collegiate Dictionary, p. 246)* (10th ed. 1994) (consideration is a recompense; payment; an act, forbearance or promise given by one party in return for an act or promise of another); and 17A *Am. Jur. 2d Contracts* §§ 113 and 114). In a prior opinion to this official, addressing similar circumstances, we held that the value of the ticket for a guest was to be reported. *Commission Op. No. 97-33*. Regarding the official's own ticket, several reasons were given for the offer of the tickets. However, the "motive" behind an offer and acceptance is distinct and different from "consideration." See, e.g., *Commission Op. Nos. 96-26 & 97-01 (citing 17A Am. Jur. 2d Contracts § 115)* (where sponsor gave tickets to an official to attend because of his status as a public official, consideration was not of equal or greater value). While public officials spoke at the event, it was not suggested that this particular official gave a presentation. As "consideration" means that "something is given in exchange," and the facts did not indicate an exchange between the official and the private company for a presentation, there was no "consideration" on that basis. In later correspondence, the official said a Senior Level Executive Branch official, who was involved in matters related to State funds for the organization, asked her to observe and assist the company to insure the success of its projects as the State had invested substantially. Where the benefit accrues to the public officer personally and to some extent to the State, with the gift giver receiving little or no benefit, then the consideration is not "equal to or greater than" as required by the statute. *Commission Op. No. 97-01*. Here, the benefit passed personally to the official and the guest, who attended an evening's entertainment. The benefit obtained by the State was that it might gain some insight as to the success of the program. As the State may have benefitted from the official's attendance, any "consideration" was to the State, not to the gift giver. Therefore, the ticket value would be reported under the Financial Disclosure Statute.

**(2) Were any Ethical Issues Raised?** As the official was in the Executive Branch, the Commission reviewed the facts to decide if any ethical issue were raised under the Code of Conduct, as required by *Executive Orders 5 and 19*. Again, we must be consistent in our opinions. In prior opinions, we said that when private sources confer benefits on public employees to perform agency related functions, it may raise, at least, an appearance of impropriety. *Commission Op. No. 97-33 (citing Sanjour v. Environmental Protection Agency, U.S. Court of Appeals (D.C.), F.3d 85, 94 (1995)* (interpreting federal ethics restrictions on accepting payment from private sources for performing official duties). Two ethical concerns

noted in *Sanjour* are: (1) when a public employee accepts benefits from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide "favours" in return. *Id.*; and (2) even if there was no reason to suspect that the private party was trying to curry favor with the employee, the acceptance of benefits from a private source may raise the appearance that government employees were using public office for private gain. *Id.* In that prior opinion, we noted that, by statute, officials from this particular office were entitled to reimbursement for expenses incident to official duties. *Id.* Thus, to the extent a Senior Level Executive Branch official asked her to attend, attendance may have been incident to official duties for which the State could have paid the official's expenses (but not necessarily those of her guest). *Id.* When the State pays, the ethical concerns raised when payments are made by private enterprises do not arise because it is presumed that: (1) such payments are in the legitimate conduct of State business and (2) the employees are then under the "watchful eye" of the agency. *Commission Ltr to Public Officers, January 21, 1997.* At least one Commissioner believed that payment might have been obtained from the State in this situation.

We have urged officials to "exercise great caution" if tickets are accepted from a private enterprise if the official makes decisions about the private enterprise, because it could appear that the offer is to curry favor or influence decisions. *Commission Op. No. 97-33.* We noted that offering additional tickets may also raise the appearance that the offer was to curry favor or influence the decision maker. *Id.* Moreover, accepting the additional tickets may raise suspicion that the official was using public office to obtain "private perks." *Id.* We noted that the concerns increase if the event is rather lavish. *Id.* Here, the official attended because she was asked to observe and assist the company to insure the success of its projects. Logically, if asked to "observe and assist the company," it could be expected that the official would develop and express an opinion on the project. As the State "has invested substantially in this project," the official's opinion could impact on future decisions regarding State funding to the company. Thus, it could appear that the offer was to "curry favor" because of the official's significant, indirect decision making authority. Further, the tickets she received were valued at \$200 each, while the tickets for the general public were \$13. This indicated that the event the official attended was likely more lavish than what the public received.

However, to decide if acceptance may have an adverse effect on the public's confidence in its government, we first note that there is a legal presumption of honesty and integrity in the conduct of government officials. *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd*, Del. Supr., No. 304, Veasey, C. J. (January 29, 1996). We also must place the concerns about currying favor in decision-making and using public office to obtain unwarranted privileges, private advancement or gain within the totality of the circumstances. *Commission Op. No. 96-78.* While the event apparently was more lavish than what was available to the general public and while she had significant, indirect decision making authority which could affect the company's State funding, the official said a higher level official asked her to go; and the evening was not solely directed at entertaining as official presentations were made. Thus, we distinguished this situation from one where we found it improper for a government official to accept tickets and solicit another ticket to a musical concert where there were no official activities, and he had decision-making authority over the gift giver. *Commission Op. No. 98-35.* Moreover, the nature of this official's position was that the matters over which she had authority were ones connected to the particular type of exhibition. Additionally, no facts indicated that any matter concerning the company's funding was under review when she attended, as it was in *No. 98-35.* *Compare also, Commission Op. No. 97-11* (members of a State agency which routinely made decisions regarding private company should not attend company's "gala" when the company had matters

pending before the agency). Accordingly, while we still encourage "great caution" in accepting payment of expenses from an organization over which an official has even an indirect, but significant, decision making authority, we found no violation in this instance.

**99-17 – Payment of Expenses—Corporate Aircraft Travel:** A State Officer was asked to be the guest speaker at an out-of-state annual meeting of a research and manufacturing association. He was asked to speak not only because of his State position but because he also chaired a national organization, which dealt with legislative and policy issues of interest to the group.

The Code of Conduct restricts acceptance of payment of expenses if it may result in:

- (1) impaired independent judgment in performing official duties;
- (2) preferential treatment to any person;
- (3) official decisions outside official channels;
- (4) any adverse effect on the public's confidence in the integrity of its government. 29 *Del. C. § 5806(b)*.

In his State capacity he had no direct or immediate decision-making authority over the association. No facts were given indicating that in his State capacity he had any significant indirect or anticipated future decision-making authority relative to the association. Based on those facts, it did not appear that his judgment would be impaired in performing official duties. He spoke on certain legislative and policy issues, emerging trends in Delaware, and possible changes in federal and State programs. The association was registered as a lobbying organization in Delaware, and therefore clearly had an interest in Delaware laws and administrative actions in areas which may impact its membership. However, no facts indicated any issues affecting the association were supported by his office, or that the association was seeking to have any legislation or administrative action introduced or drafted by his office. Based on those facts, it did not appear that he would give the association preferential treatment or make official decisions outside official channels.

Whether acceptance would have any adverse effect on the public's confidence in the integrity of its government is based on the totality of the circumstances. *Commission Op. Nos. 96-78 and 97-23*. When a government official accepts travel expenses from a private party it may evoke at least two ethical concerns: (1) it may appear to the public that the official may be beholden to the private interest and prone to provide decisional "favors" in return. *Commission Op. No. 97-33 (citing Sanjour v. EPA, U.S. Court of Appeals (D.C.) 56 F.3d 85, 94 (1995))*, (2) even if there is no reason to suspect the private payor is trying to curry favor with the official whose expenses are paid, the official's acceptance of benefits from a private source may create at least the appearance that the official is using public office for private gain. *Id.* Here, the association was registered as a lobbying organization in Delaware. Thus, it clearly had expressed an active interest in Delaware's legislative and administrative actions which could impact its membership. Thus, the public could view the payment of expenses as an attempt to curry favor with an official who could be in a position to help them on either legislative issues or administrative actions. However, against that concern, the Commission balanced the remaining facts. Specifically, as noted above, no legislative or administrative actions were pending which diminished the possibility that his judgment would be impaired; that he would give preferential treatment; or would make official decisions outside official channels. Moreover, the time spent at the conference was limited to the time during which he was speaking, leaving little, if any, possibility for association members to lobby him. Further, he received no personal benefit, such

as honoraria, nor did he engage in activities such as golfing, etc. Thus, no facts indicated that he used his public position for private gain. The Commission also noted that the reason for accepting the corporate aircraft was because he had a long-standing commitment to participate in a program back in Delaware. Because of that commitment, he could only accept the speaking engagement if arrangements were made for him to return to Delaware in time to meet his prior commitment. Moreover, he was invited not just because of his State position, but also because of the broader perspective he could bring to the proceedings as chair of the national organization. That also aided in diminishing the possibility that he was sought as a speaker just as a means of currying favor with him because of his State position.

**99-10 – Random Drawing for a TV:** A State employee asked if he could accept a television from a private company after his name was selected at a random drawing during a conference he attended. As a State employee, he attended a safety conference and trade show. The Association sponsoring the conference permitted vendors of safety-related products to have a booth. One vendor, aside from displaying products, gave a 15-20 minute presentation on safety issues. The company issued "invitations" to the presentation, and to encourage attendance, it held a drawing for a television. Attendees who went to the presentation dropped forms in a barrel, and after the presentation a drawing was held to award the television. The Delaware State employee's name was selected. The invitation to participate in the event was open to "eligible" attendees. The vendor called the Commission's office to find out if, under Delaware laws regarding gift acceptance, the Delaware State employee was "eligible." The company advised the Commission that it had contracted with the employee's State agency. The company was sent a copy of the statute and told that the State employee could seek an advisory opinion on whether acceptance would be proper. *29 Del. C. § 5807(c)* (the Commission may issue advisory opinions based on a written request from a State employee, officer, honorary official or State agency). The company also sent a letter detailing how the selection was made and its contract obligations to the State agency.

The Code restricts acceptance of gifts if it may result in: (1) impaired independence of judgment in performing official duties; (2) official decisions outside official channels; (3) preferential treatment to any person; or (4) any adverse effect on the public's confidence in the integrity of its government. *29 Del. C. § 5806(b)*. The State employee was "an end user" of some products which his agency obtained through contracts with the company. Specifically, in the computer systems used by the State employee, was a device from the company which was partially responsible for controlling certain computer operations and the result was monitored by the employee. He was not in a supervisory position and did not have any decision making authority over any company which contracted with his agency. Thus, he was not exercising any judgment over the company, nor did it appear that he was in a position to give the company preferential treatment over any competitors for the contract, or make official decisions outside official channels which favor the company. Based on those facts, the Commission found no violation.

**99-05 – Tickets to the Grand Gala:** A State officer received two tickets valued at \$225 each to the Grand Gala from a private corporation. Pursuant to the Executive Orders, the Commission was to decide if any ethical issue is raised by acceptance. E.O. No. 19. Based on the following law and facts, we concluded that no ethical issue was raised by acceptance.

In deciding if any ethical issue are raised, the Commission applied the Code provision which restricts State employees and officials from accepting gifts if it may result in: (1) impaired independence of judgment in performing official duties; (2) preferential treatment to any person;

(3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in its government. 29 Del. C. § 5806(b).

The officer said that in his official duties, he had no issues or matters with the private corporation, nor did he expect any future matters before him involving the private enterprise. As he would not be making decisions regarding the company, it did not appear that his judgment would be impaired in performing official duties. No facts were given that would indicate that he would show preferential treatment to the company or make official decisions outside official channels on its behalf. The question of whether acceptance may result in any adverse effect on the public's confidence in the integrity of its government is essentially an "appearance of impropriety" standard. We have previously noted that when a private source pays the expenses of a public official, it may evoke at least two ethical issues in the minds of the public: (1) it may appear to the public that the official may be beholden to the private interest and prone to provide decisional "favours" in return. *Commission Op. No. 97-33 (citing Sanjour v. EPA, U.S. Court of Appeals (D.C.) 56 F.3d 85, 94 (1995))*, (2) even if there was no reason to suspect the private payor was trying to curry favor with the official whose expenses were paid, the official's acceptance of benefits from a private source could create at least the appearance that the official was using public office for private gain. *Id.*

Here, the company was a registered lobbying organization. Thus, it had clearly expressed an interest in decisions made on legislative and administrative actions in the State of Delaware. Certainly, some members of the public may have viewed acceptance by a State officer, who gave input on legislative and administrative matters, of tickets to a rather lavish event from an organization which had expressed interest in legislative or administrative decisions, as creating "an appearance of impropriety" because it could be seen as an attempt to curry favor. However, the Commission must base its opinions on a "particular fact situation." 29 Del. C. § 5807(c). Moreover, those particular facts must be placed within the framework of the law. First, we noted that the General Assembly chose not to place a total ban on gift acceptance; rather, it required that we evaluate, on a case-by-case basis, the acceptance of gifts. Second, the law required that the Code be interpreted giving a legal presumption of "honesty and integrity" to State officials. *Beebe Medical Center, Inc. v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, J. Terry (June 30, 1995) *aff'd*, Del. Supr., No. 304 (January 29, 1996). Thus, while the company had expressed an interest in government decisions, the officer said he had no decisions pending regarding the company; nor had he made decisions about it before accepting the tickets. Because the company dealt with matters on which there was recent legislation regarding certain private industries, the Commission asked about his office's involvement on those matters. He said that persons in his office were involved in the legislation. However, the legislation did not apply to this company. The company might enter the market which was affected by the legislation, but such action was purely speculative. We cannot base decisions on speculative facts. *Commission Op. No. 97-11*. Accordingly, based on the particular facts, it did not appear that the tickets were offered to curry favor in decision making since he had not been, and was not, making decisions about the company.

Regarding whether acceptance created the appearance that an official was using public office for private advantage or gain, the Commission has previously noted that when a private source paid for State officials to attend events, the public may suspect that the officials were using their public position for social advantage or private gain. *See, Commission Op. No. 97-33*. We also noted that the differences in appearance of impropriety can vary depending on whether the evening's event consists of a reception of juice and cookies as compared to cocktails, dinner, etc. *Id.* We noted that the evening was of rather lavish entertainment from a

lobbying organization to a person who held a key position in the administration. Even some of the Commission members struggled with that. However, that fact must be placed within the total factual circumstances. Here, as noted, the company was not seeking official action by his office; did not do business with or seek to do business with his office; was not regulated by his office; and had no interests pending that may be substantially affected by the performance or nonperformance of his official duties. Moreover, he was entitled to the presumption of honesty and integrity. No facts indicated that such presumption was overcome.

**98-35 – Tickets to a Concert:** A private company offered a Senior Executive Branch official two tickets to a concert. The company was subject to significant decision making authority by the official. The offer of tickets was made while a decision was pending which could affect the private enterprise. The official asked the company if he could have a third ticket.

The Code restricts acceptance of anything of monetary value if it may result in: (1) impaired independence of judgment; (2) preferential treatment; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(b). It also prohibits officials from using public office for private gain or benefit. 29 *Del. C.* § 5806(e).

The Commission found that acceptance of the tickets could, at a minimum, cause an adverse effect on the public's confidence in the integrity of its government because it might appear to the public that: (1) the company was trying to curry favor with the official when a decision was pending; (2) his official judgment might be impaired; and (3) the official was using public office for private gain.

**98-31 – Payment by Private Source for Performing State Duties:** A State agency asked if its employees could be paid by a private enterprise for serving as mentors/preceptors to college students. The Commission concluded that accepting such payment would violate the Code of Conduct because it may result in the appearance that State employees were using public office for private gain. Moreover, the Attorney General's office had concluded that other laws may impact on accepting such payment, and the Commission had no authority to waive those provisions.

The Code restricts State employees from accepting compensation or anything of monetary value if it may result in: (1) impaired independent judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(b). In a prior opinion, we noted that accepting payment from private sources may raise at least two ethical concerns:

1. If the private party had an interest in the employee's decisions, it may appear that the employee was beholden to the private enterprise and prone to provide regulatory favors in return; and

2. Even if the private payor did not have an interest in the official decisions, the employee's acceptance of payment from a private source may raise the specter that government employees were "selling" their labor twice--once to the government and once to the private party. That may create the appearance that the employee was using public office for private gain which is prohibited by the code. *Commission Op. No. 97-10 (citing Sanjour v.*

*Environmental Protection Agency*, U.S. Ct. of Appeals (D.C.) 567 F.3d 85, 94 (1995).

Here, no facts indicated that the State employees would make regulatory decisions regarding the private enterprise. Thus, the Commission's chief concern was whether acceptance would have "any adverse effect on the public's confidence in the integrity of its government." This is, in essence, an "appearance of impropriety" test. To decide if an employee's conduct may result in an appearance of impropriety, the Commission considers the totality of the circumstances, based on the particular fact situation. 29 *Del. C.* § 5807(c); *Commission Op. No. 96-78*.

Here, while receiving their State salary to perform State duties, they could earn an additional \$400-800 per year from the private enterprise for performing their State duties, e.g., inspecting facilities, etc. The college students which they would mentor would accompany them, observe their performance, learn how they did their work, and eventually assist them with their work. Based on those facts, the Commission concluded that private payment to the State employees for performing State duties may, at a minimum, raise the appearance that they were using public office for private gain, which is prohibited by 29 *Del. C.* § 5806(e).

Moreover, accepting payment from other sources while performing State duties may raise the appearance that the State employees were in contravention of other laws. Specifically, the Attorney General's office has concluded that State employees are restricted from having their State salary supplemented by other sources because an "employee's services during the hours of employment belong to the employer whether prescribed by statute or by the express or implied terms of an employment contract." *Att'y Gen. Op. No. 83-1031*. Subsequently, the Attorney General's office concluded that aside from raising appearance issues under the State Code of Conduct, acceptance may also raise issues under other laws. *Att'y Gen. Op. No. 87-1024*. It noted that the Merit Rules restrict Merit employees from accepting salary supplements from private sources while on State time. *See, Merit Rule 5.0500*. Here, the State employees were Merit employees. Thus, acceptance could result in the appearance that they were acting in contravention of the Merit Rules. Such conduct could clearly have an adverse effect on the public's confidence in its government.

Moreover, the AG's office noted that when a State employee accepts payment from private sources for performing State duties that, "criminal penalties may apply depending on the circumstances." *Att'y Gen. Op. No. 87-1024*. Specifically noted were the Bribery statute, the Official Misconduct statute, and the Receiving Unlawful Gratuities provision. The "Receiving Unlawful Gratuities" provision prohibits public servants from soliciting, accepting or agreeing to accept any personal benefit for engaging in official conduct which the public servant is required or authorized to perform, and for which the public servant is not entitled to any special or additional compensation. 11 *Del. C.* § 1206. Here, the State employees were authorized by their agency to perform the duties as mentors, and no specific statute entitled them to any additional compensation. In fact, the Merit Rules appeared to specifically prohibit any additional compensation. Thus, acceptance may result in the appearance that the employees were violating a criminal provision. Again, such conduct could clearly have an adverse effect on the public's confidence in its government.

This Commission's authority to grant waivers applies only to the State Code of Conduct. 29 *Del. C.* § 5807(c). Thus, it has no authority to waive other laws, such as those referred to above, which impact on the appearance of impropriety.

**98-30 – Appearing in an Advertisement:** A State officer asked if it would violate the Code of Conduct if he appeared in an advertisement for private company and accepted payment of his expenses to travel to and from the West Coast for a photo shoot for the ad.

Under the Code of Conduct, officials may not accept payment of expenses or anything of monetary value if it may result in: (1) impaired independence of judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in its government. 29 Del. C. § 5806(b).

First, the Commission noted that while the private enterprise offered to pay his expenses to the West Coast, the trip would be for less than 24 hours, with most of that time spent in flight. Thus, it did not appear that he would receive any substantial private benefit from the trip. However, the Commission must consider all the facts in the context of the criteria which limits acceptance of anything of monetary value under certain circumstances.

Regarding his official duties, he said that he was not involved in the daily tasks of managing contracts his agency entered. However, because of his high level position, he was responsible for final decisions pertaining to contracts. The private enterprise was performing subcontract work through the State's current vendor for particular materials and services. There was no direct contract with the private enterprise. However, future contracts through his agency would require services which the company could provide, and he would be endorsing those services in the ad. If a dispute arose over a contract, he said his role was "limited" to resolving disputes with unsuccessful vendors. While he considered his decision-making authority over specific contracts "limited," the Commission believed it was significant.

Delaware Courts have noted that the purpose of State bidding laws is to "prevent waste through favoritism and yet permit proper supervision over the qualifications of bidders." *W. Paynter Sharp & Son v. Heller*, Del. Ch., 280 A.2d 748(1971). The State officer said that the State specifically prohibited using specifications that would limit vendors to one name-brand product. That was consistent with avoiding the possibility of favoritism or preferential treatment of a specific company's product. Similarly, the Code of Conduct restricts accepting anything of monetary value under circumstances that may result in preferential treatment. Thus, even though he was not involved in the daily management of the agency contracts, as a high level official with significant decision making regarding contracts, his endorsement of a specific company's product could, at a minimum, appear to reflect favoritism or preferential treatment for that company.

The concern was compounded by the fact that the ad language showed it was a promotional tool for the company to aid it in capturing large commercial contracts. The ad said that the company "offers the only nationwide program dedicated to [the particular service and] used commercially on any real significant scale." The language did not target the general public with something particularly beneficial to all citizens. Moreover, the ad would appear in publications targeting commercial businesses. Additionally, the ad attributed to him the comment that: "You can bet [the particular type of service] will be a mandatory part of every bid package that comes in from now on." He confirmed that future contracts would require this particular service. As the ad basically proclaimed the private enterprise was the only company that could handle large scale contracts of that nature, it could appear to competitors that if the service was mandatory for every bid, then the private enterprise might receive preferential treatment if it bid on or subcontracted for this particular type of State contract. Even if the company's activities were limited to work that would only be a part of the contract, other bidders may view his endorsement as requiring them to use that company for that aspect of the contract

if they wanted the State contract. Moreover, if bidders who did not use the company, were denied the contract, and wished to dispute the decision, he was the official responsible for resolving the dispute. Even if he recused himself, the fact that he was a top official endorsing a specific company's product, could cause the appearance that the contract decision was based on favoritism, undue influence, conflict or the like.

**98-29 – Corporate Aircraft Travel:** A State officer used a corporate aircraft to travel to a conference. The Commission held that it was a "gift," as defined by the financial disclosure statute, as no facts indicated any consideration of equal or greater value. See, 29 Del. C. § 5812(o). As the officer was a member of the Executive Branch, the Commission applied the Code of Conduct to decide if any ethical issues were raised by acceptance.

The Code of Conduct restricts State employees, officers or honorary State officials from accepting other employment, any compensation, gift, payment of expenses or any other thing of monetary value under circumstances in which such acceptance may result in any of the following: (1) impairment of independence of judgment in the exercise of official duties; (2) an undertaking to give preferential treatment to any persons; (3) the making of governmental decisions outside official channels; or (4) any adverse effect on the confidence of the public in the integrity of the government of the state. 29 Del. C. § 5806(b).

This is the second of two opinions regarding State officials using transportation provided at no cost by private companies. See, *Commission Op. No. 96-26*. The Commission found that it was reasonable for the officer to rely on *Opinion No. 96-26* in determining that use of the corporate jet would not violate the Code of Conduct. Both uses were similar in some respects-- they were for public purposes which benefitted the State of Delaware; the use of the private jet satisfied a justifiable expedited transportation need; and the use of the corporate jet saved the State money.

However, the Commission cautioned that the trips differed. For example, each company had different relationships with the State; the trips were scheduled differently (in *No. 96-26*, the company was making the trip because one of its directors was participating in the conference); and the more recent flight was catered. The reason for pointing out the differences in the two cases was to emphasize that the Commission's conclusions must be based on the specific facts of each matter before the Commission.

It advised the officer not to construe the opinions as blanket approval for any other use of corporate aircraft. The fact that use of a private jet saved taxpayers money was but one factor considered. Any future use of corporate aircraft could, depending on the specific facts and the cumulative effect, result in a different conclusion by the Commission if the public perception could be that a government official may become beholden to the private interest supplying the jet or that a government official may be using public office for private gain, which is prohibited by 29 Del. C. § 5806(e).

**98-27 – Award from Professional Association:** A State officer was nominated and selected for an award from a professional organization. The basis for selection was to recognize, among other things, his career dedication to public service. He received a statuette and a complimentary registration to attend the organization's meeting. As the statuette and registration were valued at more than \$250, they were to be reported as gifts under the financial disclosure statute, as no facts indicated that he had given the organization consideration of

equal or greater value. The Commission also applied the Code of Conduct to decide if any ethical issue was raised.

State officers are restricted from accepting gifts or anything of monetary value if it may result in: (1) impaired independence of judgment; (2) official decisions outside official channels; (3) preferential treatment to any person; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(b).

The officer was a member of the association and was nominated for the award to recognize his career dedication to government service. The nomination was by another association member who also worked for a Delaware agency. In his State position, the officer had no decision making authority over the association. Thus, it did not appear that his judgment would be impaired or that he was in a position to give the organization preferential treatment or make official decisions outside official channels which would benefit the organization. There was an official relationship between the agency where the nominator worked and the State officer. The officer chaired a State committee which had awarded a contract to the nominator's agency. The contract was managed by the recipient's department. It was awarded before the officer was nominated for the award. The nominator was one of the principal persons responsible for the contract, and his contribution was part of the "in kind" resources in the contract. A student, whom he supervised, was paid out of the contract. None of those facts constituted a violation of 29 *Del. C.* § 5806(b).

**98-26 – Tickets to Athletic Events:** A State employee accepted tickets to two major league athletic events from a company. The tickets were valued at \$410 for one event and \$368 for the other event. As the total value of the tickets to each event exceeded \$250, the source and value of the tickets were reported to the Commission pursuant to Executive Orders No. 5 & 19. The Executive Orders also required the Commission to decide if accepting a gift raised any ethical issues. To decide if any ethical issues were raised, the Commission applied the Code of Conduct provision which restricts State officials from accepting any gifts or anything of monetary value if acceptance may result in: (1) impaired independence of judgment in performing official duties; (2) official decisions outside official channels; (3) preferential treatment to any person; or (4) any adverse effect on the public's confidence in its government. 29 *Del. C.* § 5806(b).

The employee's official duties required him to develop and execute strategies to protect existing Delaware jobs and recruit industry to the area for additional jobs. In essence, his official duties required him to "court" the industry to protect jobs and recruit jobs for the State. While the company, like other similar companies, would have an interest in the strategies he was required to develop and execute, he had not worked on any development project for the company within the last 12 months. Thus, it did not appear that the gifts would affect his judgment on any pending official decision or result in any type of preferential treatment for this company.

The Commission emphasized that his State position was unique from most State positions because of the need to "court" private enterprises. Thus, issues regarding appearances of impropriety when a State employee accepted gifts from private enterprises were different because of the unique operations of his agency. Accordingly, the Commission found no violation of the Code of Conduct.

**98-13 – "Forbearance" as a "Gift":** A State official asked the Commission if she needed to report the value of attending a seminar where a private company asked her to serve as a

panelist at one session of the seminar. If she served as a panelist, she would not be required to pay the registration fee. The private company also paid the travel and accommodation expenses.

The Code of Conduct applies to “anything of monetary value.” 29 *Del. C.* § 5806(b). Here, the value of the registration was given in the form of “forbearance,” as the company refrained from enforcing payment of the registration fee.

**98-07 – *de minimis* Gifts:** The Commission considered a request for an advisory opinion regarding whether State employees may accept *de minimis* gifts, such as key chains, Band-Aid boxes, plastic pens, etc., from vendors at a Health Fair. It concluded that State employees may accept these small items, based on the following law and facts.

State employees and officials are restricted from accepting gifts or anything of monetary value if it may result in: (1) impaired independence of judgment; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in its government. 29 *Del. C.* § 5806(b).

The decision to grant contracts to vendors of health care services to State employees was made by a Committee. When the vendors were selected, the Committee members were not aware that the vendors intended to offer gifts at the Health Fair.

It was expected that the vendors would limit their activities to discussing their services, but not engage in sales pitches. However, subsequently the vendors asked if they could offer various free items to the State employees who attended the Health Fair. The offering of more expensive gifts was rejected by the Committee. However, having seen offerings of inexpensive items, such as key chains, etc., at Health Fairs for non-government personnel, it was asked if those items may be accepted by State employees.

The employees who would attend the Health Fair would be making a personal choice regarding the vendor they wished to use as their provider. Thus, that decision was not a decision on behalf of the State. However, some State employees did have responsibilities for making decisions in their State jobs which may have had some relevance to the providers. However, the Commission does not believe gifts of such *de minimis* value as those suggested, key chains, etc., would have any material effect on their decision making. Therefore, acceptance of such items would not violate the Code.

**97-44 – Honorarium for Education Consulting Work:** A State officer was offered an honorarium from an institution of higher learning for serving as a consultant for one of its degree programs.

The Code restricts accepting outside employment or compensation if it may result in: (1) impaired independence of judgment in exercising official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in its government. 29 *Del. C.* § 5806(b).

In his official capacity, he had no decision making authority over the institution. Although the institution periodically sought State grants and had dealings with another State agency, the State officer was not involved in making decisions regarding such grants or in making decisions regarding dealings between the institution and the other agency. Further, he did not advocate on behalf of the institution for any grant or in any dealings it had with the State. In his official

capacity, he headed an agency which provided certain support services to State agencies, including the agency which had dealings with the institution. However, those dealings had no impact on the institution. He also served on a State board which made some decisions regarding some educational institutions; however, if he found himself in a position where decisions had to be made about this particular institution, which was very unlikely, he would recuse himself.

**97-43 – Expenses Paid by Another State:** A State officer was asked to come to another State to serve as a judge in a competition which it was hosting. The other State reimbursed her expenses.

The Code of Conduct restricts State officers from accepting a payment or anything of monetary value if it may result in: (1) impaired independence of judgment in performing official duties; (2) official decisions outside official channels; (3) preferential treatment to any person; or (4) any adverse effect on the public's confidence in its government. 29 *Del. C.* § 5806(b).

The State officer had no decision making authority over either the other State's agency which reimbursed her, or over the competitors who were being judged. Also, neither the State agency, nor the competitors had any business dealings with her agency. Thus, it did not appear that she would be in a position to have her judgment impaired, nor to give either the agency or the competitors any preferential treatment. She was invited to evaluate the competition principally because of her official position and expertise in the subject area of the competition. In those circumstances, such action did not raise any appearance of impropriety.

**97-42 – Expenses Paid by Foreign Government:** A State officer, and persons from other States in similar positions, traveled to a foreign country to participate in meetings to enhance understanding with the foreign government on cultural, economic and political affairs, with a specific emphasis on government issues handled by his agency and similar agencies in the other States. The foreign government paid the travel expenses.

The official spent approximately six days overseas, and while there, attended meetings with various officials of the foreign government. He was expected not only to attend the meetings, but required to give information and a presentation on the Delaware laws which his agency enforced, with particular focus on certain Delaware laws. The agenda and his statements at the Commission's meeting showed that he was actively engaged in performing government-related duties during the visit.

The Code of Conduct restricts State employees and officers from accepting payment or anything of monetary value if it may result in: (1) impaired independence of judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) an appearance of impropriety. 29 *Del. C.* § 5806(b).

As he had no decision making authority over the foreign government in his official capacity, his judgment in performing official duties would not be impaired nor would he be able to give that government, or any member thereof, any preferential treatment. Further, the purpose of the trip and his active participation in performing duties related to his official functions did not raise an appearance of impropriety.

**97-40 – Honoraria and Payment of Expenses:** A State employee asked if accepting honoraria and/or payment of expenses would be appropriate if he: (1) made a presentation during off-duty hours to private enterprises regulated by his agency; (2) made a presentation to out-of-state organizations where it was possible that some persons in the audience could be subject to Delaware regulations he enforces; or (3) taught classes at the college level where students might subsequently decide to enter the health care field and, consequently, might become subject to the statutes which he enforced.

The Code of Conduct restricts State employees from accepting compensation, gifts, outside employment, payment of expenses, or any thing of monetary value if it may result in: (1) impaired independence of judgment; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b). Additionally, the Code prohibits using public office to secure unwarranted privileges, private advancement or gain. 29 Del. C. § 5806(e).

In interpreting federal regulations which address having expenses for government employees paid by private parties, the federal Court of Appeals (D.C.) noted that such payments can evoke at least two ethical concerns:

1. When a government employee accepts payment from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide regulatory "favors" in return. *Sanjour v. Environmental Protection Agency*, U.S. Ct. of Appeals (D.C.) 567 3d 85, 94 (1995). If the private party has an interest in the official decisions of the employee, the appearance of impropriety may remain even if the government sanctions the payment by the private party. *Id.*

2. Even if there was no reason to suspect the private payor was trying to curry favor with the employee whose expenses were paid, the employee's acceptance of benefits from a private source may raise the specter that government employees are "selling" their labor twice-- once to the government and once to the private party, thus creating at least an appearance that the employee is using public office for private gain. *Id.*

Thus, in applying Delaware law to a situation where private parties may offer to pay to have a State employee speak about his government duties, and considering the ethical issues such payments raise, the Commission finds as follows:

#### **A. Organizations Regulated by His Agency**

Certain organizations were subject to the licensing laws and/or may be investigated by his agency. Thus, he would be in a position to make official decisions regarding their licensing. He routinely refused compensation from such Delaware enterprises. However, one organization sent him a check despite the fact that he informed them that he did not wish to be paid for his presentation. There could, at a minimum, be an appearance of preferential treatment being afforded to organizations which were licensed and/or regulated by his agency and also paid him to make speeches to them. Also, it could appear that his judgment would be impaired as a result of accepting such payments and such appearance could cause an adverse effect on the public's confidence in its government. Therefore, it was determined it would be best to avoid accepting payment for such speaking engagements.

#### **B. Out-of-State National Groups**

When asked to speak out-of-state by a national organization, he declined the opportunity because he had only recently assumed his State position. Therefore, he did not believe he had been in office long enough to be familiar with the laws and regulations to serve as a speaker. However, he anticipated that such offers could come again and he asked for guidance on responding to such opportunities. The statute requires that the Commission base its rulings on a “particular fact situation.” 29 Del. C. § 5807(c). As no particular facts were before the Commission and no specific offer was pending, the Commission could not render a final decision on such activity. However, pursuant to its authority to provide guidance, 29 Del. C. § 5809(10), the Commission suggested the following as an aid in responding to such requests if they occurred. First, the Commission noted that there was the possibility that an attendee at such sessions may be in the specific career field in Delaware and therefore may be subject to the laws he administered. However, if such individuals were not involved in selecting him as a speaker and paying for his expenses, then the concern that the payment was made to “curry favor” in making his decisions was somewhat remote. Also, the appearance that he may be using public office for private gain may be reduced if the payment of expenses was “reasonable.” For example, if the private enterprise paid for four star accommodations, first class airfare, etc., the perception could be that he was turning his public position into one of social advantage or private “perks.” See, *Sanjour* at 95-96 (noting the difference in appearance if a public employee accepts private payment for a bus ride to a nearby city with a box lunch en route, as compared with a lobster dinner and a Lear jet to a far-off resort area).

### **C. Teaching at Various Colleges**

A local college had offered him the opportunity to be on its faculty but because of his government commitments, he felt he would not have the time to teach evening classes. His concerns, however, were that if he accepted a teaching job there was a possibility that some students he taught could become employed in the specific career field which his agency regulated. Whether such a situation was likely to result, was too speculative for the Commission to offer any specific guidance. However, it suggested that general guidance was provided by the Code section restricting outside employment referred to above. Also, he could review the Commission’s synopses of opinions for a better understanding of how that provision is interpreted.

**97-38 & 97-39 – Attending Athletic Events – What is “Value”?** State officers notified the Commission that they had accepted an invitation to an athletic event from a private enterprise. They attached a per-person break down of the value of attending and participating in the event, and pointed out that they did not receive all items listed, such as breakfast and a plaque. In reporting the “value” of the gift, they believed the “value” was appropriately reduced by the amount of the items not received. The Commission has previously ruled that: “value” means “a fair return or equivalent in goods, services or money for something; marketable price; relative worth, utility or importance.” *Commission Op. No. 96-33*. In that opinion, the Commission held that the “value” received when participating in an athletic event is what one would have to pay or contribute to participate in the event. Thus, to the extent that the costs to participate covered the costs for such items as plaques, breakfasts, etc., it appears that the “value” would not be reduced just because the individual did not personally partake of those items.

**97-33A – Airline Tickets Won in Drawing:** A State officer put her business card in a hat at a

social function. When the drawing was held, her card was selected and she won two tickets from an airline company for a trip overseas. The financial disclosure statute requires certain State officials to report the source and value of any gift received which is worth more than \$250 on their annual financial disclosure report. See, 29 Del. C. § 5813(a)(4)(e). Also, under Executive Orders No. 5 & 19, certain Senior Executive Branch officials must file: (1) an addendum to the annual report reflecting any gift with an aggregate value in excess of \$100, and (2) notice with the Commission within 30 days of receipt of any gift worth more than \$250, so the Commission can decide if acceptance raises any ethical issues. E. O. No. 5 ¶¶ 1 & 2; E. O. No. 19, ¶ 5th “Whereas,” and ¶ 1.

To decide if accepting a gift raises an ethical issue, the standard applied is whether acceptance may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) government decisions outside official channels; or (4) any adverse effect on the public’s confidence in the integrity of the government of the State. 29 Del. C. § 5806(b). Regarding the airline tickets, the State officer had no decision making authority, or in fact, any dealings with the airline in her official capacity. Moreover, her business card was selected at random from all business cards which were put in the hat. Accordingly, the Commission found no ethical issue raised by accepting the tickets.

**97-33B – Gift from a Foreign Government:** A State officer reported to the Commission that she received some jewelry from delegates of a foreign government which she hosted in her official capacity. The foreign government delegates were part of an agency exchange program. The foreign visitors offered the items as a complimentary gesture, given in a public presentation, as an expression of appreciation to the State officer for hosting the visitors. Performing that duty was not contingent on receiving a gift. Because her agency was involved in the exchange program with the foreign government, she may have had some decision making authority regarding the program and persons from the foreign government who participated. However, the value of the items was *de minimis*--estimated value of \$5 each for two items. The Commission also factored in the circumstances under which they were given. The Commission found that accepting the jewelry would not result in impaired judgment, preferential treatment, official decisions outside official channels or adversely affect the public’s confidence. See, 29 Del. C. § 5806(b). Thus, no ethical issue was raised by accepting the gift.

**97-33(C) – Tickets to Events:** A State agency was responsible for evaluating certain private enterprises. The evaluations affected whether the private enterprises would be entitled to State grants. The agency asked if it could put on its grant applications that the private enterprises were to provide two tickets or free admissions to events which the agency representatives would evaluate. Tickets also were obtained from organizations who had not received grants and therefore those tickets were not the result of contract requirements. In both situations, the primary purpose of obtaining the tickets was for qualified individuals, acting for the agency, to evaluate an organization to decide if it qualified for a grant or was complying with grant requirements. However, sometimes, a person who was not there to evaluate, such as a spouse or a friend, used the second ticket or admission, simply to accompany the qualified evaluator. Also, tickets were obtained to events where the primary function was more social in nature, rather than evaluative. The agency believed that if the terms were placed in the grant applications that the tickets or admissions would not be considered “gifts.”

The Commission first noted that the law permitted reimbursement of expenses related to official duties to the officials who attended events for evaluation purposes. It said that if the

State reimbursed the evaluators, then the issue would not be within the Commission's jurisdiction as it is presumed that: (1) such payments are in the legitimate conduct of State business and (2) the employees are then under the "watchful eye" of the agency. *Sanjour v. Environmental Protection Agency*, D.C. App. Ct., 984 F.2d 434, 455 (1993) (interpreting the federal ethics provision restricting payment of expenses when performing official duties)). The Commission has previously ruled that it has no authority to review expenditures made by the State. .

However, if the agency, rather than having the State reimburse the individuals, sought to place the requirement for free admission or tickets in a State grant application, then the Commission has authority to decide if obtaining the items by contract raises issues under the Code of Conduct because contracts violating the Code of Conduct may be voidable. 29 *Del. C.* § 5805(g).

As the State agency had two options--reimbursement or grant language--the Commission addressed the issues raised if the agency decided to require applicants to provide free access to their events.

### **(1) The Policy Issue**

In addressing whether a contract requirement for grant recipients to provide two tickets or free admission to any event upon request of the agency does not constitute a "gift," the Commission first noted that the facts raised more than just the issue of whether the tickets or free admissions were "gifts." As noted above, there was a policy issue of whether the agency should reimburse the officials or mandate free admissions through the grant. Other issues were identified and addressed below.

### **(2) Were tickets or admissions a "gift" under the Ethics Law?**

As the Code of Conduct does not define "gift," the plain and ordinary meaning is used. 1 *Del. C.* § 303. "Gift" means "something voluntary transferred by one person to another without compensation or consideration." *Merriam Webster's Collegiate Dictionary*, p. 491 (10th ed. 1993); *Black's Law Dictionary*, p. 619 (5th ed. 1989). When tickets or admissions were transferred to a qualified individual who attended the event to make evaluations for State grant purposes, then the transfer was not truly voluntary and the evaluator was giving consideration in return. Thus, the official did not receive a "gift," but received "payment of expenses" by the private enterprise.

However, when tickets or admissions were given to persons who were not attending as qualified evaluators, there was no consideration, and the ticket or admission was a "gift." Because that "gift" was provided to the qualified evaluator to use as he or she saw fit, then the evaluator had received the "gift." See, *Commission Ltr. Op., January 27, 1995*. Regardless of whether the tickets or admissions were "payment of expenses" or "gifts," the Code of Conduct restricts acceptance of gifts, payment of expenses, compensation or anything of monetary value if acceptance may result in: (1) impaired independence of judgment in performing official duties; (2) preferential treatment; (3) official decisions outside official channels; or (4) an appearance of impropriety. 29 *Del. C.* § 5806(b) (emphasis added). The Code also prohibits using public office to secure unwarranted privileges, private advancement or gain. 29 *Del. C.* § 5806(e). It further prohibits employees, officers and honorary officials from engaging in conduct which may raise suspicion that an individual is engaging in acts violating the public trust. 29 *Del. C.* § 5806(a).

### **(3) Did acceptance of tickets or admissions violate the Code provisions?**

When private sources confer benefits on public employees (admission to events) to perform agency related functions (program evaluation), it may raise, at least, an appearance of impropriety. *Sanjour v. Environmental Protection Agency*, U.S. Court of Appeals (D.C.), 56 F.3d 85, 94 (1995) (interpreting federal ethics restrictions on accepting payment from private sources for performing official duties). Two ethical concerns noted in *Sanjour* were:

(a) when a public employee accepts benefits from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide “favors” in return. *Id.* If the private party has an interest in the employee’s official decisions, the appearance of impropriety may remain even if the government officially sanctions the private party payment. *Id.*

(b) even if there is no reason to suspect that the private party is trying to curry favor with the employee when expenses are paid, the employee’s acceptance of benefits from a private source may raise the appearance that government employees are using public office for private gain. *Id.*

The Delaware Code of Conduct addresses those ethical concerns by restricting acceptance of gifts, payment of expenses, or anything of monetary value; prohibiting use of public office for private gain; and prohibiting conduct that may raise suspicion that the individual is violating the public trust. See, 29 *Del. C.* § 5806(a), (b) and (e).

Applying those provisions to the situation, clearly the evaluators were decision makers who must exercise independent judgment in performing the official duty of making grant decisions. The ethical problem emerges when the evaluator gives tickets to non-evaluators, such as spouses or friends. Clearly, in those situations, it could appear that the organizations, by placing no limits on who may use the tickets, are trying to curry favor or receive preferential treatment, especially when it is clear that the evaluator is performing a government function and their “guest” is not, and therefore would not be entitled to receive reimbursement from the State if they paid for the ticket. Also, accepting tickets or admissions for a non-evaluator could raise public suspicion that the government official is using public office to obtain an unwarranted privilege-- that is a “private perk” in the form of free admission for the spouse or friend.

### **(4) Tickets to Cocktail Parties, Receptions, Dinners, Etc.**

Where officials accepted tickets to events where there was no evaluative function, or where in addition to a performance evaluation the ticket included admission to cocktail parties, receptions, dinners, etc., there may also be an appearance of impropriety. The public may suspect that the officials are using their public position for social advantage or private gain. See, *Sanjour* at 95-96 (noting the difference in appearances of impropriety between accepting a bus ride to a nearby city with a box lunch en route, as compared to a Lear jet to a far-off resort area with a lobster dinner). Added to the suspicion of private perks, may be the suspicion that invitations to such events were a means of currying favor and influencing judgment when the invited official made grant decisions.

The agency posited that organizations like to see the officials at the events. However, it may appear to the public that the main reason for inviting the officials was for the opportunity to “have the ear” of persons who evaluate their grant applications. Thus, great caution should be

exercised in accepting such invitations, especially if the organization has a grant pending. See, *Commission Op. No. 97-11* (concluding that Commission members of a State agency which routinely made decisions regarding private companies should not attend an extravagant “gala” when the sponsor had matters pending before the Commission). The appearance of impropriety can vary depending on such matters as whether the evening’s event consisted of a reception of juice and cookies as compared to cocktails, dinner, etc.; whether the sponsor had an evaluation pending; etc. Those observations were offered as guidance pursuant to 29 *Del. C.* § 5809(10), and the Commission made no specific ruling because there were no “particular facts” on which to base an opinion, as required by 29 *Del. C.* § 5807(c).

## **(5) Conclusion**

Whether the agency should have the costs of tickets/admissions paid by State reimbursement or have private enterprises, who receive grants from the agency, provide tickets/admissions at no cost to the State is a policy decision for the agency. If it elected the latter option, the acceptance of tickets/admission for non-evaluators raised, at a minimum, an appearance of impropriety. Moreover, acceptance of tickets/admission to events, such as cocktail parties, dinners, etc., may raise an appearance of impropriety depending on the factual circumstances.

**97-29 – Donation of Greeting Cards:** A private enterprise offered to give greeting cards to a State agency to include in a package the agency gives to anyone in Delaware who has a baby. The card would congratulate them on the event and include a reminder to inoculate their child. The company had given these cards to at least 26 states which included them in newborn packages. The private enterprise had no dealings with any State agency, other than the one-time offer.

The Code restricts the acceptance of gifts or anything of monetary value if it may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside of official channels; or (4) any adverse effect on the confidence of the public in the integrity of the State government. 29 *Del. C.* § 5806(b).

The Commission found that no State official or employee would receive any benefit from the decision, except to the extent that such official or employee, like any member of the public, might receive the card if they are the parent of a newborn. The Commission did note that the company would receive some advertising benefit because its logo appeared on the back of the card and on a growth chart included with the card. However, it found that under these particular facts, such potential advertising benefit to the company paled in comparison to the benefit to the State and its citizens by adding strength to the State’s immunization program. Moreover, the company had no other dealings with the State so there was no potential for preferential treatment in other decisions. Also, no other companies had elected to participate in the program. Under the particular facts, the Commission found no violation of the gift restrictions.

**97-23 – Lunches from Vendors:** The State contracted with a vendor for certain services, including periodic training sessions for the agency’s trained professional staff. The contract required the training to be: (1) conducted by qualified instructors; and (2) approved for credit hours. The contractor either provided their own qualified trainers or selected qualified trainers from course catalogs. Trainers selected from course catalogs were usually sponsored by

private companies which sold products which the agency's professional staff might use in performing their State duties.

While the contract required the contractor to provide accredited training, there was no requirement for the agency's professional staff to attend. The contractor tried to encourage attendance by scheduling sessions on days that were normally reserved for training. The sessions usually were scheduled during the lunch hour and were held as teleconferences or in-class sessions. The contractor, or the companies which sponsored instructors, provided lunch to attendees. It consisted of such items as sandwiches, Chinese fare, sodas and chips. There was no promotion or advertising of the sponsoring companies. The attendees had no decision making authority in selecting the State contractor. They also had no decision making authority in choosing courses, and therefore, no decision making authority over the companies which sponsored instructors.

The Code of Conduct restricts State employees, officers and honorary officials from accepting gifts, payment of expenses or anything of monetary value if it may result in: (1) impaired independence of judgment; (2) preferential treatment of any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(d).

The question arose as the result of a prior Commission ruling dealing with lunches paid for by vendors who gave product demonstrations. *Commission Op. No. 96-78*. The Commission concluded, under those specific facts, that acceptance was not permitted. The Commission is to strive for consistency in its rulings. 29 *Del. C.* § 5809(5). While the facts in that case were similar, the Commission must base its rulings on a "particular fact situation." 29 *Del. C.* § 5807(c). For the reasons below, the Commission found that the particular facts of the case were distinguishable from *No. 96-78*.

Mainly, in *No. 96-78* the programs were conducted by sales representatives of companies which sought to sell products, not qualified instructors. The Commission balances the public interest in preventing improper attempts to influence the decisions of public employees against whether acceptance creates a genuine risk of affecting the performance of the official duties of employees. When it balanced those interests in *No. 96-78*, it found that the balance was in favor of public concerns, but it noted even then that it was a close call. See, *Commission Op. No. 96-78*. Also in *No. 96-78*, State employees decided which vendors would make presentations; the decision was not based on such criteria as whether the course provided approved credits and, in fact, no credits were generally given. Moreover, the decision was not based on presenters being trained in the specific profession, but on how familiar a sales representative was with his company's product. As sales representatives gave the training, it could raise the perception that, by the very nature of their job, they would use the sessions as an indirect avenue to a sale. Thus, this direct communication from the sales representative on his particular product might be seen as an opportunity to influence decision making.

Here, while the speakers might be sponsored by a private company, they were trained professionals, and the dictates of their profession were different from those of a sales representative. Additionally, the contractor said the presentations were unbiased and educational. That statement was supported by the fact that the presentations were made by trained professionals, and the presentations must be officially approved for educational credits. Further, the contractor said that the sponsoring companies did not make a direct presentation of their products; the companies nor their products were advertised in the presentations; and promotional materials were not distributed. Thus, the opportunity to

influence selection of a particular company's product was more remote than in *No. 96-78*.

Finally, the State contract required the contractor to offer the training, and to engage qualified instructors whose courses were approved for credit. Such contractual obligations provided additional support for the view that providing lunches in those circumstances was not likely to have any adverse effect on the public's confidence in the integrity of its government.

Thus, looking at the totality of the circumstances, including the nature of the programs presented, and weighing the public interest of preventing improper attempts, or a genuine risk, of influencing the decisions of public employees, the Commission concluded that the risks were too remote to find that accepting the lunches would violate the Code.

**97-22 – Barbeque from State Contractor:** A State agency was housed in privately owned facility which the State leased. The landlord leased other space in the building to non-State businesses. The agency asked if it would be appropriate for the State employees working at the building to accept an invitation from the private landlord to attend a barbeque luncheon.

The Code of Conduct prohibits accepting gifts or anything of monetary value if it may result in: (1) impaired judgment in official decisions; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of the State government. 29 *Del. C.* § 5806(b).

The invitees to the barbeque were middle management and line staff personnel who, although tenants in the building, were not responsible for deciding to lease the offices in the privately owned building. A separate agency made that decision. However, if there were problems with the landlord, or if the landlord was not properly fulfilling the lease terms, the tenants provided that information to the leasing agency. Because the tenants were there on a daily basis, they were more likely to note any deficiencies or exceptional services by the landlord. The weight of the information they provided to the leasing agency could significantly affect whether the leasing agency decided to renew the lease or decided to take any action to enforce the landlord's lease obligations.

The Commission based its conclusion on the fact that the tenants exercised judgment concerning the landlord's activities. Acceptance of a gift may adversely affect the public's confidence in the integrity of the government if State employees attended functions of a private landlord, such as a free barbeque, because of the significance of their judgment. The public may perceive that their judgment may be impaired or that the landlord might receive preferential treatment.

The barbeque was a planned yearly event; took place only during the lunch hour; and the per person expenditure was not significant. However, the Commission balanced those facts against considerations of the effect on the public's confidence in the integrity of its government. *See, Commission Op. No. 96-78* (to decide if accepting a lunch from vendor may adversely effect the public's confidence, the Commission looks at the totality of the circumstances).

The purpose of the statute is to insure that the public's confidence in its employees and officials is upheld. 29 *Del. C.* § 5802. Statutes enacted for a public purpose are broadly construed to achieve that public purpose. *See, generally, 3A Sands, Sutherland Stat. Constr. Chap. 71* (5th ed. 1992). Under the particular facts of the case, a majority of the Commission

concluded that attending the landlord's barbeque could create a perception problem. The elements creating the perception problem were: (1) the indirect, but significant potential of influence on decisions; and (2) the contractor's obvious business interest. It is generally accepted that business people will entertain customers often in the hope of influencing the customer to buy. Such conduct may be appropriate in the world of business but not where the recipient is a public employee.

The Commission further noted that under Delaware law, public employees who are tenants in State operated facilities are unlikely to be entitled to a meal from the State merely because of the landlord/tenant relationship. Under Delaware law, a full-time employee of the State whose salary is paid by the State, cannot receive any additional stipend for the purchase of food, be supplied with food, or be reimbursed for food that was consumed during normal working hours within the State, subject to certain discreet exceptions. *See, 29 Del. C. § 5112.* Thus, it followed even more strongly that an adverse perception could result if State tenants in a privately owned building accepted meals from their commercial landlord.

Finally, the Commission is required to be consistent in its opinions. *29 Del. C. § 5809 (5).* The Commission previously ruled that State employees were prohibited from accepting a barbeque outing from a business association whose members were licensed by that same State agency. *Commission Op No. 92-06.* Accordingly, the Commission concluded that it would not be proper for State employees to accept a barbeque luncheon under these circumstances.

**97-16 – Payment for Completing Survey While on State Time:** State employees completed surveys for vendors of certain products. The surveys provided marketing information for the vendors and were also marketing devices themselves. Vendors paid State employees amounts ranging from \$2 to \$50 to complete the survey. The agency stopped the activity and asked if accepting money for completing the surveys was permissible.

State employees who selected products and services participated in the surveys, and were permitted to respond to the surveys during official duty hours. Money for surveys went directly to the head of the section, and had been used for a yearly celebration. Agency employees and the public were invited. However, it was possible for the surveys to be sent to an employee and the agency head would not know if the individual kept the money. Further, when the agency hosted the celebration, it identified the vendor who paid for the surveys on the flyer.

The Code restricts acceptance of any compensation, gift, or any other thing of monetary value under circumstances where such acceptance may result in: (1) impaired judgment; (2) preferential treatment to any person; (3) government decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of the government of the State. *29 Del. C. § 5806(b).*

The Commission previously ruled that "accept" includes constructive possession, which means the ability to exercise control over the payment. *Commission Ltr. Op. January 27, 1995.* Here, employees could control the payment because they may give it to the agency; however, they were not obligated to do so. Further, some payments could go directly to the employees without the agency having knowledge of the receipt.

The public's confidence in the integrity of the government could be adversely affected in

that it may raise concerns that employees would, during official work hours, fill out surveys so they would receive payment from the vendor while also receiving their State pay. Further, other vendors and the public might see the recognition on the flyers of the vendors who pay for the survey as an indication that such vendors may be given preferential treatment over companies which do not pay employees for participating in a survey, especially as persons who selected the products and services participated in the surveys.

**97-11 – Party Invitation from Organization Regulated by State Agency:** Appointees to a State regulatory agency, and its Executive Director, were invited to an invitation-only dinner party given by a company which the agency regulated. The appointees to the agency, who made the regulatory decisions, served in a quasi-judicial capacity. The agency asked if it would be appropriate for them to attend the party which would consist of cocktails, dinner, speakers, etc., in a rather lavish setting. The estimated ticket cost to the company was at least \$65 per person or \$130 per couple.

The appointees were frequently asked to approve or reject, after hearings, a wide range of matters involving the company and its competitors. The company was involved in a highly-competitive industry and matters before the agency frequently gave rise to adversarial challenges from many competitors. Issues regarding the company were on the agency's agenda almost every time it held its bi-monthly meetings. In fact, issues were pending before the agency at the time the officials were to attend the party.

Two sections of the Code of Conduct were relevant: 29 *Del. C.* § 5806(a) and (b).

Section 5806(b) deals with accepting gifts, payment of expenses or any other thing of monetary value, and restricts acceptance if, among other things, it "may result in any adverse effect on the confidence of the public in the integrity of the government of the State." 29 *Del. C.* § 5806(b)(4).

Section 5806(a) admonishes State employees, officers and honorary officials "to pursue a course of conduct which will not raise suspicion among the public that he is engaging in acts which are in violation of his public trust and which will not reflect unfavorably upon the State and its government." 29 *Del. C.* § 5806(a).

In considering this section, the Commission, in another opinion, wrote:

The significant import of Section 5806(a) is that employees are to pursue a course of conduct which will not "raise suspicion" that their acts will "reflect unfavorably upon the State and its government." Actual misconduct is not required; only a showing that a course of conduct could "raise suspicion" that the conduct reflects unfavorably.  
*Commission Op. No. 92-11.*

Thus, it examined the issue: would attendance at the dinner by the officials, whether they pay for the dinner or not, likely raise suspicions that reflect unfavorably upon the State and its government?

It was clear that the agency was charged with serious and important responsibilities. For example, the Delaware Supreme Court had recognized that in certain respects it performed legislative tasks. (citations omitted). It also had recognized that it had limited authority to review the agency's performance of legislative tasks. It went on to observe that in performing other functions, the agency "acts as litigant, lawyer and judge in the initial determination of the

matter before it.” (citation omitted). Moreover, the Court had noted that in performing its regulatory functions, the agency had a specific public function, which was to regulate with the authority to “compel those corporations to discharge their duties to the public and not to exact excessive charges.” Thus, the agency had a very specific “public trust” to fulfill in performing its regulatory functions.

Because the company routinely and frequently sought decisions from the agency which were often subject to adversarial challenges from competitors, it raised concerns with the Commission about how competitors and the public might view attendance at the event. Competitors could see it as an opportunity for that company to have access to the decision-makers at the dinner which they would not have, especially when the decisions of the agency could affect them often and substantially on adversarial issues. As for the public, it could view with suspicion the attendance at the invitation-only party in a rather lavish setting hosted by a company which had several issues pending before the agency on which it would be making rulings in a few weeks, and would have other matters before the agency on a continuing basis.

The Commission believed the agency’s responsibilities and duties were of such importance to the public and to competitors, especially when it ruled routinely on issues affecting the company that attending the dinner could raise suspicions which would reflect unfavorably upon the State and its government.

**97-07 – Travel Paid by National Association:** A State officer traveled overseas to participate in meetings focusing on national and international policies in his area of expertise. His 48-hour trip was paid for by a national association of which the State of Delaware was a dues-paying member. He had no decision making authority over the association. The purpose of the trip was to share information on different approaches to issues in his field. The trip was held overseas because the issues were on-going and additional meetings were expected with some occurring overseas and some in the United States, to equalize the burden of costs and travel. The individual participated in discussion groups regarding the Executive Branch's role in formulating and implementing policy in the area of concern. Additionally, he was asked to give the international group a detailed explanation of the federal/State relationship in the United States with respect to the matters, and subsequently participated in the preparation of a report on the proceedings. The association which paid for his trip made direct payments to the vendors, e.g., hotels, air carriers, etc.

He asked how the direct payments would be treated under the financial disclosure statute. The Commission’s decision on how the matter was to be treated under the Financial Disclosure subchapter can be found in the Commission’s synopses of its Financial Disclosure Opinions.

Additionally, *Executive Orders 5 and 19*, required the Commission to decide if accepting the payment of expenses raised any ethical issues for Senior Executive Branch officers whenever the value was more than \$250. *E. O. 5 and 19*. Under the Code of Conduct, restrictions are placed on the receipt of gifts, payment of expenses, etc., if it may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public’s confidence in the integrity of the State government. 29 *Del. C.* § 5806(b).

As the individual had no decision making authority over the source of the payment, he would have no occasion to render any kind of judgment or make official decisions regarding the

association. Thus, he would not be in a position to have his judgment impaired or give them preferential treatment. Also, most of his time was spent either in flight or in the meetings; and the meetings related to performing his State duties. Thus, the Commission found no ethical issues raised.

**96-78 – Lunch from Vendor:** Vendors for a State agency were selected to give product presentations during the employees' lunch hour. Although the purpose of the presentations was to educate the employees on the products, the selected vendors also provided lunches, such as sandwiches, pizza, etc. Employees were not required to attend and rarely could they receive educational credit for doing so. Although the employees who attended did not make direct decisions on whether such vendors would be used, they were trained professionals who provided opinions to those who decided if the product would be used. A representative from the agency and a vendor stated that no pressure was put on vendors to provide the lunches. They noted that without the lunches, the staff was not as inclined to attend. They asked if such lunches fell within the meaning of "gift" and whether acceptance violated the Code of Conduct.

The Code of Conduct restricts employees from accepting:

"other employment, any compensation, gift, payment of expenses or any other thing of monetary value under circumstances in which such acceptance may result in any of the following: (1) impairment of independence of judgment in the exercise of official duties; (2) an undertaking to give preferential treatment to any person; (3) the making of a governmental decision outside official channels; or (4) any adverse effect on the confidence of the public in the integrity of the government of the State." 29 Del. C. § 5806(b).

The Code of Conduct does not define "gift." The rules of statutory construction require terms to be read in their context and given their common and ordinary meaning consistent with the manifest intent of the General Assembly. 1 Del. C. §§ 301 and 303. The dictionary definition of "gift" is "something voluntarily transferred by one person to another without compensation." *Merriam Webster's Collegiate Dictionary*, p. 491 (10th ed. 1993). This definition seems consistent with the General Assembly's intent because the same provision separately refers to "any compensation" and "payment of expenses." Under the statutory terms, the lunches could be considered: (1) gifts; (2) payment of expenses; or (3) any other thing of monetary value.

No matter which term applies, the test is whether acceptance violates any of the four statutory criteria. The Commission presumed that acceptance would not actually result in impaired judgment, preferential treatment, or government decisions outside official channels. However, to decide if acceptance would adversely affect the public's confidence in the integrity of the government, the Commission looked at the totality of the circumstances. Although attendees had no direct decision-making authority, their indirect authority was significant because they were trained professionals who could speak with authority on the product's value to those who decide which vendor to use. Further, the public could view the training as not vital because no one was required to attend and educational credit was rarely given. Also, the unique timing of the sessions, only during lunch hours, could be viewed by vendors and the public as subtle pressure to provide lunch, especially as no one was required to attend and they generally were not given credit for doing so.

The Commission weighed this public view against the facts which diminished the

question of an improper appearance: (1) the individuals did not directly decide matters about the product; (2) the meals were apparently not elaborate and did not cost much; (3) vendors were not required to provide meals and the vendor who appeared before the Commission said he did not feel pressured; (4) the individuals who did attend might enhance their knowledge and skill; and (5) while educational credit was not generally provided, the Commission noted that the agency representative, who was a trained professional, believed the sessions were valuable.

The Commission found balancing these views difficult under these particular facts, but held that it must place the views within the purpose of the statute which is to insure the public's confidence in its employees and officials. 29 *Del. C.* § 5802. Statutes enacted for a public purpose are broadly construed to achieve that public purpose. See *generally*, 3A *Sands, Sutherland Stat. Constr.* Chapter 71, (5th ed. 1992). In balancing the views in favor of the public purpose, and under the particular facts of this case, the Commission concluded that accepting the lunches from vendors created a perception problem. The elements creating the perception problem were: (1) the indirect, but significant potential of influence on decisions; and (2) the people paying for the lunches were **sales representatives**, not professional instructors, so by the very nature of their job, a perception could exist that they could use the sessions as an indirect avenue to a sale (emphasis by the Commission).

Aside from the lunches, vendors also periodically provided pens, notepads, mugs or clipboards to the staff. The Commission held that because the recipients had no direct decision making authority, the issue was whether acceptance may raise an appearance of impropriety. The Commission assumed that the items were promotional in nature, e.g., carried the company's logo and not very costly. Aside from the minimal costs, the Commission noted the FDA regulated these particular vendors regarding what kind of items may be given. There were no facts presented to suggest that acceptance created a perception of impropriety.

**96-59 – Gifts/Things of Monetary Value—Samples from Vendors:** Various vendors gave a State agency equipment samples to evaluate whether the equipment would be selected for official use by students/schools. A committee evaluated the equipment, and selected the vendor's equipment that would be for official use. The agency director asked if accepting the samples were proper. He also asked if he could use the samples as door prizes at a conference.

The Code of Conduct prohibits accepting anything of monetary value if acceptance may result in: (1) impaired judgment in exercising official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) an adverse effect on the public's confidence in State government. 29 *Del. C.* § 5806(b).

As the official status selection was not within the director's sole discretion, and as sales representatives commonly provided evaluation samples, the Commission found no violation of the above provision, regarding accepting the samples.

Regarding using the samples as door prizes, the Commission found no specific applicable provision in the Code of Conduct. A general provision precludes State employees from engaging in conduct violating the public trust. 29 *Del. C.* § 5806(a). Because the equipment was only a sample to aid the decision making process, and the students/schools would have official regulation equipment for use, the Commission found no violation in using the samples as door prizes.

**96-57 – Gifts/Things of Monetary Value—Payment of Expenses by Contractor:** The State Code of Conduct prohibits State employees from accepting any compensation, gift, payment of expenses or any other thing of monetary value under circumstances in which such acceptance may result in:

- (1) impairment of independence of judgment in exercising official duties;
- (2) undertaking to give preferential treatment to any person;
- (3) making a government decision outside official channels; or
- (4) any adverse effect on the confidence of the public in the integrity of the State government. 29 *Del. C.* § 5806(b).

A State employee was asked to participate in a national study conducted by a federal agency. The federal agency had contracted with a private consulting firm to develop a strategy for collecting data on health issues through an intergovernmental partnership. The consulting firm invited health officers, including a Delaware officer, to work with a focus group in Washington, D.C. for two days. The Delaware officer believed his participation in the group would benefit the State because Delaware would have an opportunity to help develop national policies, plus it would increase his own knowledge and development. The focus group worked throughout the first day, and reported back to the full group at the end of the day. Additional focus group sessions and policy discussions occurred on the second day. No entertainment was provided by the contractor or the federal government. He attended the conference on his vacation time. The consulting firm notified him that it would reimburse his expenses for travel and accommodations.

Previously, the consulting firm had contracted with his agency, but he did not participate in the decisions. More recently, he served on a committee which selected a contractor and the consulting firm had submitted a bid but it was not selected. It was possible that the firm might seek future contracts with his agency.

The Commission found that his independence of judgment in exercising official duties would not be influenced by having the expenses paid because he was not aware of any anticipated or pending contract requiring decisions by him that involved the consulting firm. Similarly, because he would not be making such decisions, it did not appear that he could give preferential treatment to the firm. As no government decision was to be made by him regarding the firm, it seemed unlikely that he could make a decision affecting the firm outside official channels. However, because the firm may pursue a contract with his agency and/or Division in the future, the Commission alerted him if that happened a question of whether it would appear to the public he might give it preferential treatment in contract decisions might arise. It would depend on the specific facts. As the Commission must base its advisory opinions on a “particular fact situation,” 29 *Del. C.* § 5807(c), he was advised that if a specific situation arose, the Commission could then address the question.

**96-52 – Gifts/Things of Monetary Value—Scholarship:** A national professional association of government employees in a certain career field offered scholarship opportunities to public employees to attend a university course to enhance public administrative skills. The scholarship paid for tuition, room, board, etc. Some private companies contributed the tuition funds to the national association. The association and the university reviewed applications to decide who would receive a scholarship.

The Code of Conduct restricts acceptance of gifts, payment of expenses, or anything of

monetary value if it may result in: (1) impaired judgment in exercising official duties; (2) preferential treatment to any person; (3) making government decisions outside official channels; or (4) any adverse impact on the public's confidence in the integrity of the government. 29 Del. C. § 5806(b).

The association offering the scholarship opportunity did not do business with and was not regulated by the individual's agency. The agency did not regulate the companies contributing to the tuition, but several were vendors. The individual had no personal role in selecting those companies as vendors for the agency; and was not aware that any contributor had any dealings with the agency, until after attending the course when the individual conducted a search to learn if the State agency had such dealings. The Commission concluded that the individual could not have given preferential treatment nor had impaired judgment when that individual did not choose the vendors.

**96-49 & 50 – Gifts/Things of Monetary Value—Reimbursement by Non-Profit:** Two State employees attended a criminal justice conference which consisted of daily meetings and discussion groups, including breakout group sessions on the weekends, where groups were assigned topics to discuss and report back to all conference attendees. Additionally, evening meetings were held and presentations were made during dinner. The two State employees were active participants in the discussions and presentations. Their trip was paid for by a non-profit foundation which funds grants to States to develop and implement criminal justice programs. The non-profit organization did not receive any State funds from Delaware; it had no contracts with Delaware; and neither employee engaged in any activity to solicit grants for Delaware from the non-profit foundation.

The Code prohibits acceptance of payment of expenses where acceptance may result in: (1) impaired judgment in performing official duties; (2) an undertaking to give preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse impact on the confidence of the public in the integrity of its government. 29 Del. C. § 5806(b). As the two individuals had no decision making authority over the foundation; the foundation had no dealings with the State such as seeking contracts, etc.; and the seminar was intensive and educational in nature, the Commission found no violations.

**96-28 – Gifts/Things of Monetary Value—Tickets and Accommodations for an Event:** A State officer received passes to an athletic event and the cost of lodging from a friend who was a State employee in another State. The friend received the passes from a corporation.

The standard for accepting gifts is whether such acceptance would result in: (1) impairment of judgment in exercising official duties; (2) preferential treatment to any person; (3) government decisions outside official channels; or (4) any adverse impact on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b).

The friend worked for a State agency in another State and had no affiliations or business with the State officer's Department or with any Delaware State agency. Additionally, the corporate sponsor had no dealings with either the officer's Department or any State agency. The Commission found that accepting the gift did not raise an ethical issue.

**96-19 – Gifts/Things of Monetary Value—Payment to Honorary Officials:** A State regulatory commission examined, licensed and renewed licenses of applicants for a particular license. A different agency selected a contractor to prepare examination questions. However, it might seek input from the commission members on the contractor.

To insure test questions prepared by the contractor reflected changes in the law and in industry practices, a panel of experts in that field reviewed the questions to decide which ones would be retained, updated or discarded to maintain the test validity. Two commission members and others, including some State employees, spent two (2) days reviewing 500 questions. The contractor offered each participant, not just the commissioners, \$100 per day for their work. The State employees did not accept the payment because they received their regular State compensation for attending, unlike the commissioners.

Appointees who receive or reasonably expect to receive less than \$5,000 in a calendar year are “honorary State officials.” 29 *Del. C.* § 5804(13). By law, the appointed commission members were paid \$50 per meeting and could not be paid more than \$500 per year, nor be paid for more than 10 meetings per calendar year. Attending the test-development sessions was not considered a meeting and therefore, the State could not pay the commissioners.

Honorary State officials, like State employees, cannot accept any compensation, gift, payment of expenses or any other thing of monetary value if such acceptance may result in: (1) impaired judgment in exercising official duties; (2) undertaking to give preferential treatment to any persons; (3) official decisions outside official channels; or (4) any adverse effect on the public’s confidence in the integrity of the State government. 29 *Del. C.* § 5806(d).

Under those facts, the Commission found no violation of 29 *Del. C.* § 5806(b).

**96-04 – Gifts/Things of Monetary Value—Gift Certificate from Business Agent:** A state employee was responsible for constituent relations in her division. As such, she responded to inquiries from business agents, such as the appropriate time for filing certain documents, status of a claim, etc. During the holiday season, she received a seasonal card from a business agent. Enclosed in the card was a \$100 gift certificate. The card expressed appreciation for her assistance in matters related to her State job. She believed acceptance would create an appearance of impropriety and sought an opinion from the Commission.

Her statement to the Commission was that she gave the same type of information and assistance to this business agent as she gave to anyone else who made inquiries. The Commission found that acceptance would, as a minimum, create an appearance of impropriety resulting in an adverse effect on the public’s confidence in the integrity of State government because it might appear that acceptance would result in preferential treatment to the business agent. Accordingly, the Commission directed that the gift be returned.

**95-07 – Gifts/Things of Monetary Value—Legal Services:** Prior to working for the State, an individual provided professional services to a non-profit organization. The services were primarily *pro bono*. The non-profit group derived a significant portion of its budget from State contracts. The individual’s State position might require him to review the non-profit group’s contracts. On accepting the State position, the individual advised the agency that he would recuse himself from reviewing the group’s contracts. Shortly after accepting the State position,

the non-profit group sent the individual an unsolicited gift to express appreciation for the professional services given as a private citizen. The State employee asked if accepting the gift would violate the gift provision. The Code prohibits State employees from accepting gifts under circumstances in which such acceptance may result in: (1) impairment of independence of judgment in the exercise of official duties; (2) an undertaking to give preferential treatment to any person; (3) the making of a government decision outside official channels; or (4) any adverse effect on the public's confidence in the integrity of State government. 29 Del. C. § 5806(b). Because the group had a pending State contract, the Commission found that acceptance might appear improper. However, because the gift was for services rendered, primarily *pro bono*, as a private citizen, not as a State employee, and the individual had recused himself from reviewing matters before the agency concerning the group, the Commission granted a waiver for him to accept the gift with the condition that he continue to recuse himself from matters involving the organization.

**92-06 – Gift/Thing of Monetary Value - Barbeque:** A State agency was charged with implementing a new federal law which pertained to the licensing of a certain profession. The members of the profession, who were required to be licensed by the State agency, were members of three associations related to the profession. The associations wanted to privately fund a barbeque for the agency's employees. The agency stated that the licensing program was a continuing one with new applicants applying on a regular basis. It requested a determination of whether the privately funded barbeque for the employees by the private associations would violate the Code of Conduct.

The Commission found that the activity would be contrary to 29 Del. C. § 5806(b)(2), which prohibits acceptance of other employment, any compensation, gift, payment of expenses or any other thing of monetary value where such acceptance may result in an undertaking to give preferential treatment to any person. It also found that the activity would violate 29 Del. C. § 5806(b)(4), which prohibits accepting anything of monetary value where such acceptance may result in any adverse effect on the public's confidence in the integrity of the government.

**91-15 – Gift/Thing of Monetary Value - Client Names Employee in Will:** Respondent, as part of her public employment, dealt with an individual who was of below-normal intelligence. During many years of interacting, the State employee was required to assist the individual with, among other things, financial matters. A strong relationship developed between the two. Respondent and another State employee, as a result of their employment, were designated as signatories on the individual's bank account. Respondent received and disbursed the individual's paycheck. All monies were accounted for. When the individual wanted to name Respondent as a beneficiary in his will, Respondent told him it would put her in a bad spot. Respondent and another State employee chose an attorney for him from the yellow pages and Respondent drove him to the appointment. The attorney testified that he met privately with the individual; interviewed him extensively; and was of the view that the individual understood what he was doing. The attorney also sought the opinion of a treating doctor, who responded that the individual was competent to make a will. The attorney also testified that he met with the individual four or five other times, and although Respondent accompanied the individual on each trip, the attorney never had the impression Respondent was exerting undue influence over the individual. Respondent was named as a beneficiary in the will and as a beneficiary to the individual's insurance policy. Respondent was later removed as a beneficiary to the will after telling the individual that a proposed stipulation provided that any money Respondent received would be given to charity. The individual said he did not want his hard earned money to go to

charity and that if she could not have it, he would change everything. Respondent also was removed as a beneficiary to the life insurance policy. Without Respondent's knowledge, the individual, at his attorney's suggestion, prepared a durable power of attorney naming Respondent and another State employee as attorneys in fact. When Respondent learned of the action, she immediately notified her supervisor and others at the agency.

A complaint was filed alleging Respondent was: (1) pursuing a course of conduct which could raise suspicion among the public that she was engaging in acts which violate the public trust, reflecting unfavorably on the State and its government, 29 *Del. C.* § 5806(a); (2) accepting compensation, gifts or other things of monetary value under circumstances in which acceptance may result in impairment of independence of judgment in the exercise of official duties and may result in an adverse effect on the confidence of the public in the integrity of the government, 29 *Del. C.* § 5806 (b)(1) and (4); and (3) using public employment to secure unwarranted private advancement or gain, 29 *Del. C.* § 5806 (e).

The Commission found that Respondent had not violated any of the provisions. It specifically found: Respondent endeavored to follow the proper course of action by pleading with the individual not to name her as a beneficiary; the individual removed her as a beneficiary; on learning she was named in the power of attorney, she informed her supervisor and others at the agency; and she did not accept any compensation, gifts or things of monetary value during the course of employment. Although not finding a violation, the Commission recommended Respondent be dropped from the power of attorney and the checking account. It also recommended that the agency develop guidelines for its employees so they would know what action to take if they learned they were named in wills, insurance policies, or powers of attorney by a client.

**91-14 – Gift/Item of Monetary Value - Lodging, Food and Travel:** The Commission was asked to grant a waiver to the Director of Company Regulation, Department of Insurance, to permit her to accept an invitation from an insurer regulated by the Department to travel out of the country to help establish a regulatory operation for insurance in former Soviet Union countries. The regulated insurer was selected as the exclusive reinsurer in the Russian Republic and was pursuing similar exclusive contracts with the Baltic Republics. The contracts with a Delaware company made it foreseeable that when Russia established an insurance industry, its entry into the American market would probably be through Delaware. The director was invited because of her ten years of experience in insurance regulation and assistance to Latvians in drafting their insurance code.

The Commission was advised that the Insurance Department travelled regularly at the expense of the insurance industry to examine regulated companies. Costs paid by the regulated insurers covered travel, board, food, and an hourly fee. The employees accepted no honoraria. The procedures eliminated costs to the State, were standard procedure in all States, and were within federal guidelines. The Commission heard testimony that there were very specific guidelines for regulating insurance companies and there was no area of "judgment calls" which could be slanted toward playing favorites with the paying insurer.

For this trip, the Commission was advised that the State would benefit from not paying the costs and from having the opportunity to assist in insuring uniformity of regulation in the insurance industry from this market. It was told the trip would be spartan and the schedule "backbreaking." Waivers may be granted where the literal application of a prohibition in a particular case is not necessary to achieve the public purpose of the Code or

would result in an undue hardship on any employee, officer, official or State agency. 29 *Del. C.* § 5807(a). Specific prohibitions considered by the Commission were: (1) pursuing a course of conduct which will raise suspicion among the public that the individual is engaging in conduct in violation of the public trust and will not reflect favorably on the State and its government, 29 *Del. C.* § 5806(a); (2) incurring obligations in substantial conflict with the proper performance of official duties, 29 *Del. C.* § 5806(b); and (3) accepting any compensation, gift, payment of expenses or anything of monetary value under circumstances that would impair judgment, 29 *Del. C.* § 5806(b)(1) - (4). Based on the specific facts of the trip, the Commission granted a waiver.